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Issue Date: 20 December 2002

Case No.: 2002-AIR-00006

In the Matter of

DAVID LAWSON,
Complainant,

v.

UNITED AIRLINES, INC.,
Respondent

Appearances:

Steven Silvern, Esq.
Sunshine Benoit, Esq.
For the Complainant

Jennifer Robinson, Esq.
For the Respondent

Before:

JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER GRANTING RELIEF

This case arises under the employee protection provision of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Public Law 106-181, 49 U.S.C. § 42121, ("AIR 21"or "Act"). This statutory provision, in part, prohibits an air carrier, or contractor or subcontractor of an air carrier, from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration ("FAA") or any other provision of Federal law relating to air carrier safety.

In aviation whistleblower cases, the complainant has an initial burden of proof to make a prima facie case by showing (1) the complainant engaged in a protected activity; (2) the complainant was subjected to adverse action; and (3) the evidence is sufficient to raise a reasonable inference that the protected activity was the likely reason for the adverse action. 49 U.S.C. §42121(b)(2)(B)(i); 29 C.F.R. §1979.104(b)(1-2). When the complaint reaches the hearing stage, the complainant must demonstrate, by a preponderance of the evidence, that he engaged in protected activity which was a contributing factor in the employer's alleged unfavorable personnel decision. 49 U.S.C. §42121(b)(2)(B)(iii); 29 C.F.R. §1979.109(a); *see also Trimmer v. United States Department of Labor*, 174 F. 3d 1098, 1101-02 (10th Cir. 1999)(discussing distinct analytical model utilized under 42 U.S.C. §5851 (1992), as opposed to traditional burden-shifting framework established under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-05 (1973)). Only if the complainant meets his burden does the burden then shift to the employer to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior. 49 U.S.C. §42121(b)(2)(B)(iv); 29 C.F.R. §1979.109(a).

The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. They also are based upon my observation of the demeanor of the witnesses who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformance with the standards of the regulations.

References to CX and RX refer to the exhibits of the complainant and respondent employer, respectively. JX refers to joint exhibits, and ALJX refers to administrative law judge exhibits. The transcript of the hearing is cited as "Tr." and by page number.

I. STATEMENT OF THE CASE

This issue in this case is whether Complainant's protected activity contributed to Respondent's adverse employment action.

Complainant contends that his internal complaints were "protected activity" under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Public Law 106-181, 49 U.S.C. § 42121, ("AIR 21"or "Act"). (Complainant's Closing Brief, p. 6-7). Complainant alleges that the respondent discriminated against him because of his protected activity by holding him out of service on April 2, 2001, and eventually terminating him on May 9, 2001. (Complainant's Closing Brief, p.8-21).

It is United's position that while protected activity took place and Complainant suffered an adverse employment action, no nexus between the two can be demonstrated. Rather, United advances that Complainant was terminated from his employment for insubordination, intimidating a supervisor, and using foul language. (Respondent's Closing Brief, p. 2-3).

II. PROCEDURAL HISTORY

The complainant, David Lawson, was employed by United Airlines, Inc., Respondent, from 1985 until his removal from the employer's grounds on April 4, 2001, and subsequent termination on May 9, 2001. (Tr. 426). On June 21, 2001, Mr. Lawson filed a complaint with the Department of Labor alleging numerous grounds of discrimination. (ALJX 4). On December 7, 2001, the Regional Administrator for the Occupational Safety and Health Administration, Region VIII, Denver, Colorado, [hereinafter OSHA], determined that Lawson's complaint had merit. Specifically, OSHA determined that Complainant established a prima facie case of discrimination and that Respondent failed to produce evidence demonstrating that Respondent would have fired Complainant absent his protected activity. (ALJX 1). The Regional Administrator issued a preliminary order reinstating Complainant to his previous position with Respondent. (ALJX 3). Respondent objected to OSHA's findings, and, on January 2, 2002, filed a request for a formal hearing. (ALJX 5).

On January 2, 2002, this matter was referred to the Office of Administrative Law Judges. I was assigned to the case on January 4, 2002. A Notice of Hearing and Preliminary Order was issued on January 9, 2002. (ALJX 7). On March 5, 2002, I granted a joint motion for expedited discovery. (ALJX 8). Both parties moved for summary decision regarding the enforcement of the preliminary order of reinstatement issued by OSHA, and I denied both motions on May 6, 2002. (ALJX 9). On May 14, 2002, I issued a Notice of Hearing and Pre-Hearing Order, setting the date for a formal hearing and directing the parties to submit certain pre-hearing statements. (ALJX 10). Both parties again moved for summary decision on May 14, 2002. Complainant requested partial summary decision finding Respondent's withdrawal of a settlement offer constituted discrimination under the Act, and Respondent requested summary decision dismissing the instant case in its entirety. I denied both motions on May 30, 2002. (ALJX 12).

A formal hearing was held on the record from June 3, 2002 to June 7, 2002. All parties were provided an opportunity to present testimony, offer documentary evidence, and advance oral arguments. Post-hearing briefs and reply briefs were simultaneously submitted to the administrative law judge after the hearing.

III. ISSUES

1. Whether Complainant engaged in protected activity by
    a) reporting a safety problem to lead mechanic Robert Hendricks on July 6, 2000;
    b) meeting and discussing safety concerns with Steve Sanborn on July 6, 2000;
    c) filing a safety gram on July 11, 2000;
    d) asking Steve Sanborn if the safety issue was resolved in September 2000 when Complainant heard from a co-worker that Mr. Weakland had proclaimed the issue was resolved;
    e) calling United's Chicago offices to inquire whether the safety issue was still open;

f) calling James Rynott at least three times from September to October 2000 for advice concerning the safety issue;
g) placing telephone calls to United's New York, San Francisco, and Chicago offices to locate the flight crew on the plane when the July 6, 2000 safety incident occurred;
h) providing copies of the safety gram to United's San Francisco and Chicago offices;
j) meeting with Mr. Weakland and Ms. Stuke on October 9, 2000 to discuss the safety issue;
k) sending United upper-management an e-mail describing the safety incident and investigation on October 24, 2000;
l) meeting with Ms. Stuke and Mr. Krasovec in late November or early December to discuss the safety issue;
m) meeting with Quality Assurance investigators Goetz and Thompson to discuss the safety issue;
n) participating in the January "closure" meeting with Pommerer, Goetz, Thompson, Weakland, and Galloway;
o) holding a follow-up meeting with Thompson concerning further issues not addressed in the January "closure" meeting; or
p) e-mailing Tony Boots in February 2001 about the safety investigation?

2. Whether Complainant suffered adverse employment actions when Respondent held Complainant out of service on April 2, 2001, and, subsequently, terminated him on May 9, 2001?

3. Whether Complainant's protected activity was a contributing factor to the adverse employment action suffered by Complainant?

IV. CREDIBILITY FINDINGS

I have carefully considered and evaluated the rationality and internal consistency of the testimony of all witnesses, including the manner in which the testimony supports or detracts from the other record evidence. In so doing, I have taken into account all relevant, probative, and available evidence – analyzing and assessing its cumulative impact on the record. *See, e.g., Frady v. Tennessee Valley Auth.*, 92-ERA-19 at 4 (Sec'y Oct. 23, 1995)(citing *Dobrowolsky v. Califano*, 606 F.2d 403, 409-10 (3d Cir. 1979)); *Indiana Metal Prod. v. Nat'l Labor Relations Bd.*, 442 F.2d 46, 52 (7th Cir. 1971).

Credibility is that quality in a witness which renders his evidence worthy of belief. For evidence to be worthy of credit,

> [it] must not only proceed from a credible source, but must, in addition, be 'credible' in itself, by which is meant that it shall be so natural, reasonable and

> probable in view of the transaction which it describes or to which it relates, as to make it easy to believe it.

Indiana Metal Prod., 442 F.2d at 52. An administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. *See Altemose Constr. Co. v. Nat'l Labor Relations Bd.*, 514 F.2d 8, 15 n.5 (3d Cir. 1975).

Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior and outward bearing of the witnesses from whom impressions were gathered as to their demeanor. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and the demeanor of witnesses.

The transcript of the hearing in this case is 1,273 pages, comprised of the testimony of twenty-three different witnesses.

I found the testimony of John Crommelly, Robert Amundsen, Kevin Thomas, Jodie Lawson, Bruce Huntsman, Dusty Stevens, Scott Brown, and Robert Hendricks to be credible.

I found the testimony of Jim Pommerer to be credible. Pommerer's testimony regarding the events surrounding the July 6, 2000 safety gram and the use of foul language by United mechanics was honest and thorough. Accordingly, I grant Pommerer's testimony probative weight.

Larry Coleman's testimony was taken telephonically, and, thus, my opportunities to address his credibility were limited. Accordingly, I grant his testimony less weight. Beyond that limitation, however, I found his testimony to be generally credible.

I found David Lawson to be credible. Mr. Lawson's testimony revealed that he harbored animosity over the respondent's handling of his safety concern, which occasionally produced boorish behavior. His testimony, however, remained consistent under cross-examination and never appeared dishonest or contrived. While there is no doubt that Mr. Lawson has strong feelings concerning how his employer treated his concerns, I discovered no indicia of dishonesty, and I grant his testimony probative value.

Mr. Huber's testimony was both equivocal and contradictory, and I found his credibility to be poor. Huber's testimony regarding the release of the airplane strains believability by passing blame to the mechanics when he was the lone individual to speak to the pilots once repairs began, and his rationale that it was convenient to blame management evinces an indifference to the facts of the situation. In addition, Huber's proclamation that, before spring 2001, he could never recall a United employee using foul language defies reason and the great weight of testimony from

other, more credible witnesses. Huber's equivocation on the issue of foul language – when he recalls that Bob Hendricks may have used profanity and cursed at him – highlights another deficiency of Huber's testimony: convenient memory lapses. At times Huber recalls events occurring two to three years in the past with clarity and detail; however, when pressed to recall whether it was true that Hendricks had used profanity toward him three different times, Huber responds with the luke-warm "maybe." When questioned over the Hendricks' foul language incident, Huber stated that he spoke to someone, but he could not remember to whom.

Huber's testimony concerning the tire jack incident also detracts from Huber's credibility. In Huber's reply to Dusty Stevens's grievance, Huber stated that the tag of the jack listed "fictitious defects." (CX 49). Yet, under oath, Huber admitted that he did not know the full extent of the defects of the jack. (Tr. 561). Huber's implicit admission of prevarication with regard to his earlier diagnosis of the jack's defects undercuts his already poor credibility.

I found John Weakland's testimony to be generally credible. The evidence of the instant case contains numerous e-mails and other documents in which Weakland states that meetings occurred between Sanborn and Complainant. The evidence clearly demonstrates that this did not occur. Despite this apparent contradiction, Weakland's testimony sufficiently explained that his representations were the byproduct of the misdirections of Steve Sanborn. Thus, overall, I found Weakland's testimony to be honest, thorough, and credible.

I found Jeff Griego's testimony to be generally credible. While demonstrating a profane disposition and an antagonistic relationship with management, I found Griego's testimony concerning his use of foul and abusive language to be honest and thorough. I grant less weight, however, to Griego's testimony concerning the break room confrontation involving Complainant, Sanborn, Galloway, and Zunker due to his apparent bias against United's management.

I found Frank Krasovec to be credible. His testimony was honest and thorough, and he was cooperative on the stand, despite inquiries into the appropriateness of his actions. I found Krasovec forthright in his admissions of shortcomings on the part of Sanborn, Huber, and himself. Krasovec's statement that he acted to implement improved procedures to avoid a reoccurrence of the July 6, 2000 incident gives me pause over my evaluation of his credibility due to the apparent fact that management made no effort to correct the procedural errors leading to the conflict in the instant case. (Tr. 698-99). With the exception of that statement, however, I find Krasovec credible, and I grant his testimony probative weight.

I found John Wood to be credible in both his testimony concerning the events around Complainant's safety gram and his testimony addressing the use of foul language in the workplace.

I found Stan Galloway's testimony to be generally credible.

I found Kevin Zunker to be generally credible. Zunker's testimony concerning the intent of Sanborn and Galloway during their meeting before they left to find Complainant, however, is unclear. (Tr. 980-81, 1000-01). I grant less weight to Zunker's testimony in this regard as he appears to offer contradictory versions of what happened, but, beyond that exception, I found Mr. Zunker's testimony to be forthright and honest.

I found Steve Sanborn's testimony totally lacking credibility. Sanborn was evasive, occasionally unresponsive, and outright untruthful. The record reveals numerous misrepresentation by Sanborn. As I consider the case as a whole, it is clear that the conflict between Complainant and management was, in substantial part, the byproduct of Sanborn's actions.

The record is replete with examples of Sanborn's misrepresentations. First, Sanborn testified that Pommerer and Complainant did not want to talk to Huber, but the weight of the evidence reveals Sanborn never inquired about such a meeting. Complainant and Pommerer deny such an offer, and Sanborn's supervisor acknowledges that no such offer was made. Second, Sanborn represented to his superiors that he was meeting with Complainant on numerous occasions, in response to an order to meet with the mechanic. However, again, no such meeting took place. Sanborn's explanation – his supervisor got the wrong impression about whether he had met with Complainant occurred because their discussions took place in passing at a stressful time – rings hollow. Weakland testifies to no such rushed meetings, and Sanborn's explanation defies common sense. Third, Sanborn's explanation that his original responses to the safety gram were lost in a mail "loophole" strains believability. Fourth, Sanborn's explanation for not interviewing the flight crew, when his version of the facts rested solely on Huber's version of his interaction with the flight crew, defies reason. The controversy between the mechanics and Huber hinged on who told what to the flight crew. For Sanborn to simply adopt Huber's version, without any effort to interview the flight crew evidences an unreasoned investigation and, for the instant matter, his poor credibility.

Furthermore, Sanborn's changing version of events when Complainant confronted him in the doorway of the break room further reduces his credibility. On the numerous occasions Sanborn was called on to explain the confrontation, his versions varied, ranging from 1) Complainant made the remarks as he passed by, to 2) Complainant made the remarks by getting up close, face to face. Also, in his testimony during the formal hearing, Sanborn denied asking Complainant for his badge during the break room confrontation. (Tr. 1108). However, in his case review, Sanborn asserted that he asked Complainant to hand over his badge. (CX 72).

Beyond the specifics of the incident with Complainant in the break room doorway, Sanborn's version of the actual number of times he had a confrontation with Complainant has also varied. Under oath at his deposition and before this Court, Sanborn testified that he had a confrontation with Complainant in February 2001 where Complainant called him a "piece of shit," but Sanborn never reported this incident in his charging papers or summaries or during the investigative review hearings. (Tr. 1163-65). Sanborn's changing story simply detracts further from his credibility.

Under direct examination, Sanborn testified that Galloway and he decided to talk with Complainant and effect a change in behavior while avoiding formal discipline. (Tr. 1101-02). However, under cross-examination, Sanborn testified that they had made a tentative decision to impose a Level 4 discipline on Complainant before they approached him in the break room. (Tr. 1151). Sanborn's two conflicting versions further detract from his credibility.

Several witnesses offered only limited testimony addressing incidents of foul language exchanges between supervisors and mechanics. I found these witnesses – Mark Kulachkosky, David Margos, Tim Ross, and John Lambert – and their testimony credible as it demonstrates the working environment at United.

V. FINDINGS OF FACT

The evidence in the instant case addresses two distinct issues: 1) incidents of abusive or foul language used by mechanics and supervisors, and 2) incidents pertaining to Complainant's submission of a safety concern through his termination. I shall address each individually.

A. Foul Language Evidence

Robert Hendricks, a mechanic for Respondent for thirty-three years, testified to numerous incidents where he used foul language toward his superiors. (Tr. 306-07). Hendricks testified that he called Kevin Huber "a fucking loser" three times, in addition to telling him, "You don't know what a fucking airplane is." (Tr. 311-12). Hendricks was not disciplined or terminated for his encounters with Huber.

Hendricks also testified to two incidents where he was abusive towards his supervisors but did not use foul language. Once, in the lunchroom during a heated exchange, Steve Sanborn told Hendricks that he could not talk to him like that, and Hendricks responded, "Yes, I can. You don't have any idea what you're doing." (Tr. 314). Hendricks was never disciplined for the statements. (Tr. 315). Sanborn dismissed Hendricks's foul language as "grandstanding" and explained that Hendricks was "colorful." (Tr. 1093-94). On another occasion, Hendricks also told supervisor Dan Rash that he was incompetent. (Tr. 324).

John Wood, another United mechanic, told Jim Spade to "get fucked." (Tr. 745, 750-51). Wood was not disciplined for the incident. (Tr. 751). Wood also told supervisor Randy Hein to "get the fuck off of my airplane," and, again, he was not disciplined. *Id.* Wood called Dan Rash a "brain dead motherfucker." *Id.* Wood was not disciplined by United, but he was counseled by the union for the incident. *Id.* Wood testified that he does not curb his use of foul language when supervisors are around. (Tr. 755).

Tim Ross, a United mechanic, told supervisor Tom Linville "fuck this" and "blow me" during a heated exchange over a safety issue when he felt like Linville was not paying attention to him. (Tr. 178-79). Ross was never terminated or disciplined for his remarks. (Tr. 179). Ross also

testified that he once told foreman Dan Rash to "get the fuck out of my gatehouse." (Tr. 180). Ross was never disciplined for his remark to Rash. *Id.* At another time, when Ross was upset at the actions of a supervisor, Ross told the supervisor never to touch his plane again or he would "break his neck." (Tr. 180-81). Ross was never disciplined for his remarks. (Tr. 181).

United mechanic Jeff Griego testified concerning a heated exchange he had with foreman Mike Peale. (Tr. 659). Griego and Peake argued over parking an airplane when Griego told Peale he did not know what "fucking he was doing" and that he was acting like an idiot. (Tr. 659-60). Griego stated that they were yelling at each other – nose to nose, face to face. (Tr. 661). Griego was never disciplined for his run-in with foreman Peake. *Id.* Griego also testified that once he called Frank Krasovec a "fucking idiot" as he walked out of a meeting. (Tr. 661-62). Griego was never disciplined for his actions. (Tr. 662). Griego also kicked a trash can across a room when he became frustrated over what a foreman was requesting of him. (Tr. 662). Griego was not disciplined. *Id.*

David Margos, another United Mechanic, testified that once, when Sanborn called him and woke him late in the night, he told Sanborn that "the next son of a bitch that calls me in the middle of the night will – you know, I'll personally come in and explain it to him." (Tr. 423). Margos stated that he was never called again by Sanborn in the middle of the night, nor was he ever disciplined for his remark. *Id.* Under oath, Sanborn denied remembering Margos's statement. (Tr. 1141-42).

Kevin Thomas stated that it was "pretty commonplace" to use foul language around a supervisor, and that he had done so. (Tr. 223-23).

United mechanic John Lambert testified that it was "normal" for supervisors to use foul language. (Tr. 734-35). Lambert stated that once he called Jim Neary, who had recently had a death in the family, to ask a question. (Tr. 735). Lambert asked Neary how he was doing, and Neary responded, "Well, that's a stupid fucking question." *Id.* Lambert responded, "Fuck you," and slammed the phone down. *Id.* Then, Lambert called Neary again, said "fuck you" again, and slammed the phone down a second time. *Id.* Lambert testified that foul language was "part of our work environment." (Tr. 736).

Mark Kulachkosky, United mechanic, testified that, after explaining a problem he was having, supervisor Jim Neary told him to "just go out and do your fucking job." (Tr. 275-76). Kulachkosky stated, "[A]busive language and raised voices are used commonly in stressful situations." (Tr. 284-85).

Stan Galloway also commented that foul language was used commonly. (Tr. 802). Galloway estimated that 60-80% of the mechanics used foul language. *Id.* Galloway stated that most profanity was mitigated by context. He explained that management had no interest in punishing mechanics for losing their temper for fear of adding more fuel to an already contentious environment due to the stressful contract negotiations. (Tr. 801-04).

When asked about the arguments between mechanics and supervisors, Jim Pommerer stated, "it's a common occurrence." (Tr. 94).

Steve Sanborn testified concerning the discipline of a mechanic, Aldretti. (Tr. 1138). Aldretti swore at a ramp supervisor, and he was counseled about his inappropriate behavior. (Tr. 1138-39). When asked if Aldretti cursed again after his counseling, Sanborn denied knowing if Aldretti had cursed again. (Tr. 1139). However, when faced with his deposition testimony, Sanborn acknowledged that Aldretti cursed again and was given a Level 1 discipline. (Tr. 1139-41).

B. Chronology of Events Surrounding Complainant's Safety Concern and Termination

In the early 1980s, Complainant attended Sacramento City College A&P School. (Tr. 426). After school, Complainant took a job in Chico, California, with West Air. *Id.* Complainant worked next for National Aeromotive in Oakland, California, until he was hired by Respondent on December 2, 1985. *Id.* Complainant's last station of employment for Respondent was Denver, Colorado. Complainant worked in Denver from May 1, 1995, to May 9, 2001. (Tr. 427).

The majority of Complainant's employment was spent as a terminal mechanic. (Tr. 429). He worked overnight to repair the planes to ready the aircraft for service the next morning. (Tr. 429-30).

By all accounts, Complainant was an exemplary mechanic for Respondent. Complainant received numerous commendations related to both service length and performance. (Tr. 426-27; CX 53). One of the four commendations Complainant received was awarded by Supervisor Steve Sanborn. (Tr. 428; CX 53). Complainant explained that it was nice to be recognized. (Tr. 429). In his over fifteen years of service for Respondent, Complainant was disciplined only once, for a failure to properly document certain work activities. (Tr. 426). The discipline was a "Level 1," representing the lowest form of formal discipline.

At that time, Complainant testified that his relationship with Sanborn was "fine. It was nice."(Tr. 429). But, it was not perfect from Sanborn's perspective. Sanborn's first individual interaction with Complainant was during career development interviews, which Sanborn was conducting. (Tr. 1063). Sanborn testified that Complainant refused to participate. *Id.* Sanborn stated that Complainant was "embittered towards management." *Id.* Due to Complainant's attitude, Sanborn was cautious of Complainant, and Sanborn decided to give Complainant "some distance." (Tr. 1065). Sanborn stated, "I gave him a lot of room." (Tr. 1128).

On July 6, 2000, Complainant and his work partner, mechanic Jim Pommerer, were assigned to repair an A-320 aircraft. (Tr. 430-31, 434; CX 2). Pommerer had worked seventeen years as an aircraft mechanic. (Tr. 51). The mechanics' job was to perform an overnight check on the airplane, including addressing a deferred "218 left pack" on the plane. (Tr. 434-35; CX 2). During their inspection, the mechanics determined that the float control valve was not operating

correctly. (Tr. 436-37). The severity of the problem, however, meant the mechanics would not be able to complete the repair before the scheduled 6:00 a.m. departure. (Tr. 437). Because the plane had a "Priority 1" repair needed, it could not fly unless it was downgraded to a "Priority 2" repair, which only Line Maintenance, and not a mechanic, could do. *Id.* Eventually, the problem with the plane was "broken," or reduced, to a Priority 2 problem. (Tr. 439). Thus, the plane could depart on time.

After speaking with a pilot, Pommerer discovered that the problem was deferred improperly, as the float control valve needed to be locked out, so the mechanics proceeded to make the repair. (Tr. 52, 54, 440-41). The flight was a S.T.A.R. (Start The Airline Right) flight, meaning a delay in the morning can have a ripple effect all day long. (Tr. 52). Pommerer proceeded to explain the situation to the pilots, including what equipment needed to be shut down; not to touch it until it was fixed; and that he would inform them when they were done. (Tr. 55). Pommerer did not "tag" the affected equipment because the M.E.L. (minimum equipment list) did not require such tagging. (Tr. 56-57). As the mechanics made the necessary repair, supervisor Kevin Huber pulled up to the plane and inquired about the delay. (Tr. 54, 441). Complainant explained the situation. (Tr. 55, 441). Complainant "locked" the valve and told Pommerer to "safety" the valve so he could begin the necessary paperwork. (Tr. 442). At that point, Complainant moved away from the airplane and went into the gatehouse. *Id.* As Pommerer proceeded to finish the repairs, he heard the aircraft's systems start-up. (Tr. 58). Pommerer was startled and he immediately jumped down to the ground. (Tr. 59).

Approximately thirty seconds later, Pommerer, who appeared very upset to Complainant, came into the gatehouse and asked if Lawson had given the flight crew permission to turn on the "bleed," or power, to the pack. (Tr. 443-44). Complainant denied telling the flight crew to start the plane, and Pommerer then asked the flight crew who gave them permission to start the plane. (Tr. 60). The crew identified Huber, who was standing in front of the plane. (Tr. 60-61). When Pommerer asked Huber if he had given them permission, Huber denied it. (Tr. 61).

Complainant aided Pommerer in placing the paneling back on the airplane and continued to complete the paperwork. (Tr. 444). At that point, Pommerer informed Complainant that it had been Huber who had given the flight crew permission to turn the bleed back on. *Id.* Complainant proceeded to ask the flight crew about the incident, and the pilot informed Complainant that the mechanic in the white shirt said that "all that was left was paperwork, maintenance was done." (Tr. 445).[1] Complainant and Pommerer informed the lead mechanic, Bob Hendricks, of the situation. (Tr. 62, 445). Hendricks then called Steve Sanborn, Acting Operating Manager, to come down to the hangar. (Tr. 62, 445, 1040). When Sanborn arrived on the scene, he told Complainant and Pommerer to not file a safety gram and that he would speak to Huber about the incident. (Tr. 62, 446, 1042, 1045, 1049-50). Sanborn testified that he offered a meeting between Complainant, Pommerer, and Huber, but that Complainant and Pommerer did not want such a

[1] Later, the pilot and co-pilot also identified Huber as the individual who gave the flight crew permission to leave. (CX 18-19).

meeting. (Tr. 1042). Complainant, Hendricks, and Pommerer testified that, at that time, Sanborn did not mention the possibility of a meeting between Complainant, Pommerer, and Huber. (Tr. 62, 309, 446).

Sanborn informed John Weakland, the Operations Manager for whom Sanborn was substituting, about the incident when Weakland returned to work in the second week of July. (Tr. 571-72). Weakland understood that Sanborn would handle the problem. (Tr. 572). Weakland testified that he did not immediately direct Sanborn to meet with both Complainant and Pommerer, (Tr. 573), but Weakland later testified that, sometime before September 26, 2000, he did order Sanborn to meet with both mechanics. (Tr. 575; CX14).

A few days after the incident, Pommerer spoke with Bruce Huntsman who works as a United mechanic and full-time safety coordinator for ground safety. (Tr. 344-45). Huntsman encouraged Pommerer to file a safety gram. (Tr. 345).

Complainant and Pommerer were off duty from July 7 to July 10. (Tr. 447). When Complainant returned to work on July 11, there was no news from Sanborn. (Tr. 448). Complainant and Pommerer discussed the situation, and they decided to file a safety gram. *Id.* On July 11, Pommerer wrote the safety gram, but both Complainant and Pommerer discussed the language and signed it. (Tr. 63-64, 448-49; JX 1). Once completed, Pommerer gave the safety gram to Sanborn. (Tr. 68).

Once Sanborn received the safety gram, he wanted Huber to respond in writing. (Tr. 1047). Huber prepared a statement on July 14, 2000, in response to the allegations of the safety gram. (CX 4; Tr. 535). Huber denied telling the flight crew to operate the pack. (CX 4). Rather, Huber alleged that he told the crew they had to defer the pack and would be "ready shortly." *Id.* Then, Huber stated that he was told by Complainant, Pommerer, or the lead mechanic that "they didn't want [him] up there." (Tr. 536). Huber testified that he did not release the plane, but rather a mechanic did. (Tr. 540). In addition, Huber testified that the flight crew made a mistake and tried to blame him because it was easy to blame management. (Tr. 540-41).

Once Sanborn received Huber's response, he determined for himself what the root cause of the problem was, but he did not contact the flight crew. (Tr. 1053; CX 4). Sanborn believed that the final safeguard to prevent the incident would have been tagging the switches and further communication with the cockpit as to what the switches needed to do. (Tr. 1051). Sanborn testified that he "felt beyond a doubt [that he] had the answer," and "no matter what else anyone had done, if [tagging the switches] had been done, this wouldn't have happened." (Tr. 1053). Sanborn stated that communicating a piece of equipment's inoperability was the mechanic's responsibility, but he admitted that he did not know if Complainant or Pommerer had orally told the crew not to run the bleed. (Tr. 1055).

Several days passed, and the mechanics received no answer to their safety gram. (Tr. 68-69). Then, from Bob Hendricks, Complainant heard that the safety gram had been resolved. (Tr.

452-54). Hendricks had walked off a job when Huber appeared on the scene. When John Weakland called Hendricks in to discuss his walking off a job, Hendricks explained that he walked off because Huber had an open safety gram. Weakland informed Hendricks that the issue was resolved, and, then, Hendricks passed the information on to Complainant. When Complainant asked Sanborn if the issue had been resolved, Sanborn claimed to know nothing. (Tr. 453-54). Weakland testified that he may have told Hendricks that the safety gram had been resolved due to the misrepresentations of Sanborn. (Tr. 588-89).

Complainant telephoned Respondent's Chicago offices and discovered that the safety issue had not been resolved. (Tr. 454). Shortly thereafter, Complainant called Jim Rynott, who worked in Respondent's Chicago People Services offices, for advice. *Id.* Rynott memorialized his conversation with Complainant in a September 13, 2000 e-mail to Nancy Stuke, another People Services representative. (CX 79). Rynott wrote that Complainant alleged there was a cover-up. *Id.* After his original September 13, 2000 meeting with Rynott, Complainant would have one or two more conversations with Rynott. (Tr. 476).

Although he co-filed the safety gram with Complainant, Pommerer did not participate in the calls to the Chicago offices. (Tr. 72-73). Pommerer testified that he feared retaliation not from the actual filing but from the persistent efforts to receive an answer which continually ran into road blocks. (Tr. 72-73).

On September 14, 2000, Stuke then forwarded Rynott's e-mail to Frank Krasovec, in which she stated, "I'm sure this is one of the issues [Wally Dahl] and I need to discuss. Being that it has gone to the level of an incident it is really important I keep you in the loop." (CX 10, p. 1-2). After receiving Stuke's e-mail, Krasovec responded, stating, "Nancy - this is an issue on our Midnight shift. I will work with John Weakland the OM and get this put to bed. *We have answered this on numerous occasions apparently Mr. Lawson doesn't get it*. Thanks - Frank." (CX 10, p.1)(emphasis added). The basis for Krasovec's belief that the safety issue had been answered on numerous occasions was the representations of John Weakland that Sanborn had met with the mechanics. (Tr. 585). Weakland testified that he had relied on the misinformation provided by Sanborn. *Id.*

One week later, on September 21, 2000, Krasovec again e-mailed Stuke, stating, "We have discussed this issue with one individual and will be meeting with the other this week. John Weakland is in the process of composing a letter of response to this issue. We should have it completed early next week." (CX 10, p. 1). John Weakland was copied on the September 21, 2000 e-mail from Krasovec to Stuke. *Id.*

On September 24, 2000, Weakland wrote a letter to Jim Rynott at United's world head-quarters, answering an inquiry from Rynott regarding the status of the safety investigation. (Tr. 586; CX11). Complainant and Pommerer were also copied on the letter. (CX11). In the letter, Weakland stated that he offered a meeting to Complainant and Pommerer including Huber,

Hendricks, and himself; however, Weakland had not spoken directly to Complainant or Pommerer. (Tr. 586-87; CX22). Rather, Weakland had communicated through Sanborn. Weakland understood, again through Sanborn, that Complainant and Pommerer did not want such a meeting. (Tr. 587). In addition, Weakland stated that he directed Sanborn to meet with Complainant. (CX 11). However, no such meeting occurred. Again, Weakland's incorrect statements were predicated on the misrepresentations of Sanborn. Sanborn denied ever being given such a directive by Weakland, and he did not receive a copy of the letter. (Tr. 1189).

Shortly after Complainant spoke with Rynott, he received, through Pommerer, Sanborn's written response to the safety gram. (Tr. 69-70, 456). Complainant received the response on September 27, 2000, but the response was dated July 23, 2000. *Id.* Sanborn's response stated, "I made the commitment to them [Pommerer and Lawson] to investigate the situation, which I have done." (CX 5). Sanborn reported the following "facts": 1) no safety cards were used to tag the equipment being worked on, and 2) Huber denies telling the flight crew to turn on the bleed. *Id.* Sanborn also wrote:

> As to the suggested resolution, I had offered a meeting with myself, Team Leader Huber, Lead AMT Hendricks, and AMT's Pommerer and Lawson. I wanted to give them the opportunity to resolve the underlying issues of the role of the Team Leader with respect to the operation, and how we could improve our working relationship. This was declined, closing the door to any communication or improvement.

Id. Sanborn's claim in his response that he had offered a meeting was, again, a complete fabrication.

Sanborn admitted at the formal hearing that he did not send his response to the safety gram in the allotted five days for response. (Tr. 1056-57). Sanborn testified that he mailed his response, but that it was lost in the mail system's "loopholes," thus causing the delay in the mechanic's receipt. (Tr. 1058-60; CX 5). Sanborn testified that he did not send a response to Complainant because Pommerer was the lead person on the safety gram. (Tr. 1058-59). In fact, Sanborn testified that he never spoke with Complainant about his resolution to the safety gram. (Tr. 1068). Sanborn also denied ever telling Weakland that he met and discussed the July 6, 2000 incident with Complainant and Pommerer. (Tr. 1068-69, 1145). Rather, Sanborn intimates that Weakland must have misunderstood him. *Id.* Sanborn testified that he never intended to mislead Weakland and that Weakland may have misunderstood him because most of his discussions with Weakland "were in passing under a great deal of activity." (Tr. 1145, 1176-77).

Sanborn also asserted that if he had been attempting to cover-up the fact that his response was outside of the five day window for responses to safety grams, he would have back-dated his response within five days of the filing of the safety gram. (Tr. 1060). Beyond his late response, Sanborn testified to mishandling the investigation. (Tr. 1070).

Complainant was dissatisfied with Sanborn's written response on several levels. First, Complainant knew that Sanborn never attempted to set up such a meeting. (Tr. 70, 457). Furthermore, Complainant was upset that the flight crew was not contacted to validate their version of events. (Tr. 457). Complainant called Sanborn to protest the inadequacy of his investigation, and it was a heated telephone call. (Tr. 458-59, 1075-76). Sanborn told Complainant to "get the flight crew," and Complainant thus proceeded to attempt to contact them. (Tr. 459-60, 465-67). Eventually, Sanborn hung up on Complainant. (Tr. 1076).

Around the same time – late September – Complainant called George Cook of Denver Ground Safety for his advice. (Tr. 460). Subsequently, Cook called John Weakland and inquired why the flight crew was not contacted to verify the safety gram, but Weakland could not provide Cook an answer. (Tr. 461). Cook also shared Complainant's concerns with Frank Krasovec. (Tr. 673).

On October 9, 2000, Complainant and Pommerer were working on an airplane when Huber told Complainant that Weakland wanted to talk to Complainant. (Tr. 467). Complainant proceeded to call Weakland, and Weakland informed him that he wanted to talk with him about the safety gram. *Id.* Weakland did not want to speak to Pommerer, however. (Tr. 75, 468). Before Complainant went to speak with Weakland, Complainant went to see the shop steward, Wayne Lee, and he informed Lee of the meeting. (Tr. 468). Lee informed Complainant that he had spoken with Weakland, and Weakland told Lee that the meeting was a "divide and conquer issue." *Id.* Lee accompanied Complainant to the meeting with Weakland, but Weakland informed the men that the meeting was cancelled since Nancy Stuke could not attend. (Tr. 469). Weakland told them that Stuke had overslept and could not make the meeting. *Id.*

After the aborted meeting, Complainant and Pommerer went to see Stuke personally. (Tr. 76, 469). Stuke promised the men a response by the time Complainant returned to work from a break in ten days. *Id.* However, when Complainant returned to work, around October 19, 2000, and checked his mail and e-mail, there was no response. (Tr. 76, 470).

On October 24, 2000, Complainant and Pommerer authored a letter to various upper management at United, including Huber, Sanborn, Weakland, Stuke, Krasovec, John Cronnely, Lois De Guzman, Max Malone, Ed Soliday, Andy Studdert, Ron Utecht, Don Nielson, Bill Norman, and United CEO John Goodwin. (Tr. 76, 470-71; CX 15). The letter stated, "The dishonesty, lack of concern, communication, integrity and refusal of accountability is irrefutable evidence of the irresponsibility of this management team." (CX 15, p. 1). In addition to relaying the frustrating events of Complainant's effort to get an answer, the letter also spoke of a "cover up" and an "environment of hypocrisy." (CX 15, p. 1-2).

In response to the October 24, 2000 letter, Frank Krasovec wrote an e-mail to Stuke, Weakland, and Cook on November 3, 2000. (CX 16). Krasovec stated:

> We have been working through this issue with these mechanics since July 11. The safety gram was answered and copies sent to the originator and WHQSY. *The investigator, Steve Sanborn has held several meetings with both individuals to discuss the outcome of this safety gram. Each time that they have discussed this issue it turns toward an issue of management being present for each morning departure and their perception that we are watching over them.*

(CX 16)(emphasis added). The e-mail recounted other efforts by Complainant and Pommerer to obtain a satisfactory answer, and Krasovec promised to keep the recipients informed of their progress. *Id.* From his conversations with Weakland, Krasovec was under the impression that Complainant and Pommerer had received a response by September 15. (Tr. 679-81, 684-86). Despite Krasovec's statement to the contrary, Sanborn had conducted no meetings with Complainant. (Tr. 473). Krasovec was concerned that no one had talked to the flight crew, though he was also concerned about tagging the instruments when they were not operational. (Tr. 682-83).

At the end of November or early December, Complainant and Pommerer were called into a meeting with Krasovec and Stuke. (Tr. 79, 476). Krasovec knew that Complainant was unhappy with the situation, and he apologized for the unfortunate events. (Tr. 689, 1214). Krasovec testified that he told Complainant that Sanborn and Weakland handled the situation "very poorly." (Tr. 685). This assessment was made before Krasovec discovered that Sanborn had not met with both Complainant and Pommerer. *Id.* Krasovec testified that Sanborn's actions would be something that "most people might take an issue with," but he drew the line at retaliation. (Tr. 690). During the meeting, they also discussed bringing in Quality Assurance for an investigation. (Tr. 79, 477).

One week later, Bob Goetz and Carl Thompson from Quality Assurance showed up to interview Complainant and Pommerer. (Tr. 80, 477-79; CX 21). Goetz and Thompson also planned on interviewing the other parties to the incident. (Tr. 479-80, 1070; CX 20).

Next, Complainant and Pommerer were informed that there would be a meeting to go over Goetz and Thompson's resolution of the problem. (Tr. 480-81). Scheduled for early January, the purpose of the meeting was to bring closure to the problem. Goetz, Thompson, Pommerer, Stan Galloway, Weakland, and Complainant were in attendance. The meeting was one of Galloway's first acts on the job in Denver. (Tr. 806-07). Huber and Sanborn were not included in the meeting, as it was felt that their presence would only produce tension and hostility. (Tr. 889) At the meeting, Goetz and Thompson distributed their final report. (CX 22). The report stated that the pilots of the plane involved in the safety incident corroborated the versions advanced by Complainant and Pommerer. (Tr. 482; CX 18-19 and 22, p. 2). Once Complainant read the report, he asked Weakland how he could justify telling Bob Hendricks that the safety issue was resolved when clearly it was not. (Tr. 482). Weakland replied that Sanborn had led him to believe that it had been resolved. Weakland also denied telling Wayne Lee that the meeting he scheduled with Complainant only was to "divide and conquer" Complainant and Pommerer. (Tr. 482). Complainant then asked Thompson how he justified Sanborn pre-dating his response to the safety

gram. (Tr. 483). Thompson replied, "Funny nobody got his letter and everybody but God got yours." *Id.* Galloway testified that Goetz and Thompson told the meeting participants that the meeting was for closure. (Tr. 807). Goetz told Complainant that the issue need not be over, and Complainant said that it was not. *Id.*

Reflecting on the meeting, Pommerer testified, "[I]t was kind of a wash-down effect to equally blame everybody involved to put an end to the inquiry." (Tr. 88).

The investigators' report made four formal recommendations: 1) Station management should review the roles and responsibilities of gate mechanics and Supervisor to assure a clear understanding of how they work together as a team in the terminal environment; 2) Station activities such as briefings or use of the maintenance video channel should be used to further the understanding and need for good communication skills; 3) Station management should review the entire SHEC process with both Management and Union employees to assure understanding of roles and responsibilities; and 4) Local procedures should be developed and communicated to entire station team on how SHEC concerns will be tracked to assure timely completion. (CX 22, p. 3).

Despite the recommendations, Complainant testified that station management never reviewed the SHEC process, nor did they offer training or materials concerning improving communications. (Tr. 484-85). Indeed, Complainant testified that he was unaware of any of the recommendations being followed. (Tr. 485). Bruce Huntsman also testified that the Goetz/ Thompson report's recommendations were not followed. (Tr. 360-61). Krasovec testified that he was happy with the resolutions of the "closure" meeting, and he was surprised at the possibility that the mechanics had not been briefed on the proper SHEC procedures. (Tr. 698-99). Sanborn, however, testified that he did follow through on some of the report's recommendations. He testified that he briefed people in the hangar about the use of the SHEC forms. (Tr. 1187). Sanborn stated that he did not brief mechanics, and he cannot say if they were ever briefed. (Tr. 1188).

Days after the "closure" meeting in January, Complainant and Pommerer had a follow-up meeting with Thompson. (Tr. 88, 485-86). During the meeting, the mechanic expressed concern that Bob Hendricks was never interviewed by Thompson and Goetz, and that changing the MEL, (CX 24), to indicate that tagging equipment in the process of repair was not suggested, even though some blame was placed on the mechanics. (Tr. 486, 488-89). Thompson told Complainant and Pommerer that they had valid concerns. (Tr. 485-86, 495). Thompson later informed Complainant that he had contacted Goetz with the mechanics' concerns, but Goetz simply responded, "It's over." (Tr. 88-89, 121, 495).

When Complainant realized that none of the "closure" meeting report's recommendations had occurred, he and Pommerer wrote an e-mail to Tony Boots, a management employee in San

Francisco. (Tr. 90, 495). Boots told Complainant that he forwarded the e-mail to Don Nielson, who was Frank Krasovec's boss. (Tr. 91, 496). Neither Complainant nor Pommerer ever received a response. *Id.*

On February 8, 2001, Complainant was "pushing" a plane with a tractor when Huber inquired why Complainant was pushing the plane. (Tr. 496-97). Complainant told Huber the plane was broken and "Why don't you make something up, you're a liar anyway." (Tr. 497). As Complainant rode away, he called Huber a "piece of shit." (Tr. 497, 542-43; CX 23). Complainant did not hear Huber respond, and Complainant was not disciplined for the confrontation. (Tr. 497, 543). This was Complainant's last substantial interaction with Huber before his termination. (Tr. 497). After Huber's exchange with Complainant, Huber talked to Operating Manager Wally Dahl. (Tr. 546). Dahl advised Huber to do nothing because he did not want the appearance of retaliation. *Id.* Thus, Huber had to "take it on the chin." *Id.* Huber testified that he cannot remember if he recommended counseling, a non-formal punishment remedy, to Dahl. (Tr. 547).

Huber responded that, before his exchange with Complainant, he could not recall another United employee using foul language. (Tr. 543). However, later in his testimony, Huber equivocated, stating that he could not remember whether or not Bob Hendricks addressed him with profanity during a heated exchange. (Tr. 543-44).

Complainant had several additional confrontations with Sanborn.

One day in February, Sanborn walked into the break room, and Complainant called him, "Mr. Integrity." (Tr. 498, 1095). Complainant testified that no one, including Sanborn, ever said anything about the remark. *Id.* Sanborn testified that he "kind of let that go." (Tr. 1096).

Sanborn testified to another confrontation in February when Complainant allegedly called him a "piece of shit." (Tr. 1087-88). Sanborn testified that he talked to someone, though he could not remember to whom, and that person advised him to call a shop steward if he could not tolerate Complainant's behavior. (Tr. 1088-89). Sanborn felt like it would not be productive to talk with Complainant, as he referenced his first interaction with Complainant during the career development interviews where Sanborn alleged he first recognized Complainant's poor attitude toward management. (Tr. 1089). Sanborn never mentions this incident in the charging papers or summaries during the investigative review hearing. (Tr. 1163-65).

In early March, Complainant was searching for a place to eat his lunch when he walked into a room, saw Sanborn sitting alone, and said, "Great, now I can eat my lunch and puke." (Tr. 499, 1089). Sanborn testified that Complainant was angry and that he was worried because he was in an office with no windows or door. (Tr. 1089-90). Afterwards, Sanborn talked with Stan Galloway about the incident. (Tr. 812-13, 1094). Galloway told Sanborn that, if it happened again, that they should get the union involved. (Tr. 814, 1094). Sanborn stated that he was worried about appearing retaliatory. (Tr. 814, 1095, 1130-31). Complainant, however, was never

disciplined for the remark. Galloway testified that he did not counsel Complainant because he did not want to add to the volatility of the situation. (Tr. 886).

On April 2, 2001, before he started his shift, mechanic John Lambert told Complainant that Huber had removed a "red tag" from a broken jack and placed it back in service.[2] (Tr. 500). Complainant stated that no accountability was taken by management, and that someone was going to be maimed or killed. (Tr. 500-01).

Later that evening, as Complainant walked into a parts room in the break room, Sanborn held the door open for Complainant. (Tr. 502, 1097). As Complainant walked by, he said to Sanborn, "You know, you're a piece of shit. I don't know how you sleep at night. You have no conscience." (Tr. 502-03, 1098). Sanborn replied, "I'm getting a shop steward." (Tr. 502, 1098-99).

During the confrontation, Complainant made no aggressive or threatening gestures. (Tr. 503, 1098). Complainant testified that he did not intend to intimidate Sanborn, but rather it was his frustration boiling over. (Tr. 504). Sanborn testified that it was Complainant's words and

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[2]Huber denied that he improperly removed the tag. (Tr. 551; CX44). Rather, Huber claims that he was in the process of downgrading the red tag to a yellow tag, but that he told the mechanics to go ahead and use the jack. (Tr. 551). Huber was unaware that a plane had fallen off of the jack due, allegedly, to problems with the jack. (Tr. 552). Mechanic Dusty Stevens filed a safety gram concerning the placement of the jack in service. (CX 45). Subsequently, Huber responded again that he intended to place a yellow tag on the equipment. (Tr. 553). On the safety gram, Stevens alleged that Huber had caused safety problems on "numerous occasions." (CX 45). Huber admitted the jack was defective, although he did not feel it was unsafe, but Huber ultimately believed that allegations were spurious and that the safety gram was not the proper forum to voice them. (Tr. 553, 555, 568). Huber also thought the mechanics were "playing games with us." (Tr. 1256). Larry Coleman received a letter from Huber questioning whether a grievance filed against Huber contained violations of Rules #5 and 40 of the Rules of Conduct. (Tr. 388-89, 554; CX 47). Rule 5 addresses actual or attempted threatening, assaulting, or intimidating a supervisor. Rule 40 addresses publishing false, vicious, or malicious statements concerning any employee, supervisor, or the company. (Tr. 389-90). Coleman responded to Huber's letter and agreed that the grievances contained "gross generalizations about [Huber] that could not be established." (Tr. 391). Huber testified that he wasn't looking for discipline, but for clarification of the previous problems, and Huber claimed that the threat of discipline was how Stevens could be motivated to comply. (Tr. 557). However, Mr. Coleman's response letter and Mr. Weakland's letter threatened punishment. (CX 46, 48).

facial expressions which bothered him. (Tr. 1098). There is conflicting testimony on the proximity of Complainant to Sanborn during this exchange, but the weight of the evidence demonstrates that the remark was made in passing, with a reasonable distance between the two men.[3]

After the confrontation, Sanborn immediately spoke with Stan Galloway. (Tr. 816, 1099). Galloway testified that Sanborn entered his office looking frazzled, upset, and shaken up. (Tr. 816). Sanborn was worried about the escalation of the tension between Complainant and himself, and he feared the results the next time he and Complainant were alone because he did not know what would happen next. (Tr. 816-17, 1099-1100). Sanborn testified that he was scared and that he was intimidated when people were not with him (Tr. 1099, 1159). When Sanborn relayed the events to Galloway and told him he was intimidated by Complainant, Galloway said they needed to get a shop steward for an investigation. (Tr. 817, 1101). During their meeting, Galloway and Sanborn consulted the Rules of Conduct to determine the nature of the violations and possible discipline. (Tr. 819-20; JX7, p. 22-23). After talking with Sanborn, Galloway determined that Complainant needed to be held out of service. (Tr. 821). Galloway testified, however, that he and Sanborn never discussed or considered termination. (Tr. 822). The highest level of discipline considered at this point was a "Level 4" discipline. *Id.* Sanborn testified that his conversation with Galloway initially produced a decision to investigate the problem to see if they could solicit a change in behavior. (Tr. 1101-02). Neither Sanborn nor Galloway wanted Complainant fired. (Tr. 826-27, 1102). However, under cross-examination, Sanborn testified that he and Galloway had made a tentative decision to impose a "Level 4" discipline on Complainant before they went to the break room. (Tr. 1151).

Because Sanborn and Galloway were contemplating some form of discipline, they were required by union rules to contact a shop steward. (Tr. 824). Sanborn and Galloway located the shop steward, Kevin Zunker, and they briefed him on the situation, including the use of inappropriate language by Complainant. (Tr. 824, 980-83, 1102). Zunker testified that he could not remember if intimidation was ever mentioned as an offense Complainant had committed. (Tr. 1008-09). During the meeting of Sanborn, Galloway, and Zunker, Zunker called John Crommelly. (Tr. 146, 825, 981-82). Crommelly testified that Sanborn or Galloway told him that they were going to hold Complainant out of service for his comments to Sanborn. (Tr. 146). Crommelly addressed Sanborn and Galloway and asked them to have an open mind about the situation. (Tr. 146, 169-70, 828). Crommelly wanted them to investigate before coming to any proposed discipline. (Tr. 828, 982). Zunker testified, however, that Sanborn and Galloway mentioned the

[3] Complainant has consistently maintained that the remarks were made in passing and that he did not "get in Sanborn's face." Sanborn's version of the exchange, however, fluctuates. Sanborn has said Complainant got in his face, but he also said that Complainant stopped only long enough to say what he said. (Tr. 1098). Sanborn also has described it as a "fairly close proximity." (Tr. 1097-98). In his case summary, Sanborn said Complainant "passed by" him, (CX72), but in the investigative review hearing Sanborn said Complainant got up close and face to face with him. (CX73, p. 2).

possibility of a dismissal or holding Complainant out of service during their initial meeting. (Tr. 981).

Later that evening, Complainant was told that the Operating Manager Stan Galloway, Sanborn, and the shop steward, Kevin Zunker, were looking for him. (Tr. 504). Complainant knew that Sanborn had gone to retrieve a shop steward, (Tr. 502, 916), and, minutes later, Galloway, Sanborn, and Zunker found Complainant in the break room. (Tr. 829, 1105). At that time, there were approximately ten United employees in the break room. (Tr. 829).

The testimonial record produced varying versions of the confrontation between the men in the break room, with great disagreement over what was and was not said. The weight of the evidence, however, demonstrates the following interaction.

Sanborn asked Complainant to follow them for an investigation. (Tr. 505, 829). Complainant then asked, "What investigation?" (Tr. 505).[4] Complainant added that if they wanted to conduct an investigation, they could do it in the break room in front of people that he trusted, referring to the other mechanics in the room. (Tr. 505, 830). Complainant believed that if he did not have witnesses he trusted, "[his] fate was sealed." (Tr. 916). Sanborn denied the request and said, "Either you go to the clerk's office or I'm taking your badge." (Tr. 505, 830-32). Complainant looked at Galloway and asked if he was being fired. (Tr. 505, 1106). Sanborn told Complainant he was giving him a directive,[5] (Tr. 831, 870, 1105), and Galloway asked Complainant if he realized he was failing to comply with an investigation. (Tr. 832-33). Then, another mechanic in the room, John Wood, suggested that Complainant go with the men and see what they wanted. (Tr. 225, 505, 833, 1106). After that, Complainant left with the men. (Tr. 505). According to all involved, the break room interaction lasted between three and five minutes. (Tr. 223, 506, 665).

The weight of the evidence also reveals the following things did *not* happen.

No one ever informed Complainant that refusal to go with the men was insubordination. (Tr. 506). Sanborn testified that he did not recall explaining to Complainant the ramifications of his refusal. (Tr. 1154, 1156).

Complainant never explicitly refused to go to the investigation. Jeff Griego and Galloway corroborated that Complainant never refused to go, (Tr. 664-65, 870-71), and Sanborn testified that he could not remember if Complainant ever explicitly refused to go. (Tr. 1158).

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[4] Galloway testified that Complainant was agitated; however, Zunker testified that Complainant was not agitated at first. (Tr. 830, 984).

[5] Jeff Griego and Kevin Thomas testified that Sanborn never said it was a direct order. (Tr. 223, 665).

Even if Complainant's hesitation were interpreted as a refusal, he was never given an opportunity to reconsider his refusal.

Complainant was not advised of his ability to grieve -- to "comply now and grieve later" as provided in United's employee handbook. Galloway testified that he did not advise Complainant of his ability to grieve the order "due to the volatility of the situation." (Tr. 873). Galloway's explanation is counter intuitive, however. The obvious rationale behind informing an employee that he is free to grieve later is to defuse a volatile situation.

Neither Sanborn nor Galloway sufficiently explained to Complainant why the investigation needed to be private, despite United's guideline's provision for management to address an employee's concern about following an order. (Tr. 880-82; JX 7, p. 62). Griego also testified that neither Galloway nor Sanborn would tell Complainant the nature of the investigation. (Tr. 664). Kevin Thomas testified that Complainant asked what the nature of the investigation was two to four times before either Galloway or Sanborn stated that it was for intimidating a foreman. (Tr. 224-25).

Before Complainant, Galloway, Sanborn, and Zunker all met to proceed with the investigation, Complainant and Zunker spoke privately. (Tr. 984-85). Zunker felt like Complainant had an "axe to grind" and that Complainant aggravated the situation. *Id.* Zunker believed Complainant was caught off-guard by the investigation, and that explained the delay in Complainant's compliance. (Tr. 990-91).

Once Complainant, Galloway, Sanborn, and Zunker reached the meeting room, Sanborn said, "I'm walking you out pending an investigation." (Tr. 509). Sanborn testified that, based on Complainant's disobedience and uncooperativeness with the investigation, they held him out of service. (Tr. 836, 1106-08). Complainant proceeded to ask Sanborn about pre-dating his report, but Sanborn refused to speak about it. (Tr. 510). Complainant admitted that during the meeting he was not truthful about his confrontations with Sanborn that night. *Id.* Complainant testified that he denied having the conversation with Sanborn because he panicked about losing his career. Later in the meeting, Complainant admitted the "puking" confrontation, but he did not admit to calling Sanborn a piece of shit. (Tr. 511). Complainant then told the men he wanted the meeting to end, and Sanborn called an end to the meeting. (Tr. 511-12, 848). Complainant was then walked off the property. (Tr. 848, 1112-13).

After Complainant was "walked off," Galloway and Sanborn discussed the events of the evening and the appropriate level of discipline. (Tr. 852). Galloway proceeded to call his supervisor, Krasovec, and brief him on the events of the evening. (Tr. 854). After speaking with Krasovec, Galloway and Sanborn discussed the appropriate level of discipline while consulting the Rules of Conduct. (Tr. 855). Complainant's discipline was changed from a Level 4 discipline to a Level 5 discipline because of "not leaving the break room when he was directed, and, two, not complying with completing the investigation." (Tr. 849-50). According to Galloway, Sanborn prepared the initial paperwork. (Tr. 856-57; CX 72; JX 3,4).

John Crommelly also testified that he was called by Galloway, Sanborn, and Zunker after the confrontation in the break room, around 5:00 a.m. or 6:00 a.m. (Tr. 147, 173-74). Crommelly said that one of the men informed him that they were holding Complainant out of service on a Level 4 discipline charge based on insubordination. (Tr. 147, 174). The men informed Crommelly that Complainant refused to go to the meeting room, and Crommelly asked Zunker if that was true. (Tr. 148). Zunker told Crommelly that Complainant eventually went to the room, and Crommelly asked the men how it could be insubordination if Complainant complied. (Tr. 148, 174). Subsequently, Crommelly was surprised to see the proposed level of discipline increased to a Level 5. (Tr. 148-49). When Krasovec next came to work, Galloway also met with him to discuss the events. (Tr. 856).

Complainant proceeded to go through the union grievance process. (Tr. 513). For his second step investigative review hearing, John Crommelly and Scott Brown assisted Complainant. (Tr. 514). Stan Galloway, as the Operating Manager, presented the company' case. (Tr. 864). Krasovec was the hearing officer for the hearing, and, despite the union's request, Krasovec declined to step down as the hearing officer. *Id.* During the second step investigative review hearing, Sanborn never alleged he was "cornered" by the complainant nor did he allege other incidents of using "cuss words" beyond the April 2, 2001 incident. (Tr. 515). Furthermore, Sanborn alleged he gave Complainant the opportunity to sit and talk about the safety issue, but he never had. (Tr. 516). After the hearing, Complainant again received an offer to come back to work with a "Level 4" discipline. Complainant again declined. (Tr. 517). In his decision, Krasovec upheld the proposed "Level 5" discipline and termination. (CX 73).

At the third step hearing, Larry Coleman served as adjudicator. (Tr. 383). At the hearing, Galloway stated that he realized Complainant's frustration came out of handling of the safety gram. (Tr. 866). Coleman also knew that Complainant's vulgarities originated with Complainant's safety concern. (Tr. 388). During the hearing, Complainant called John Wood to testify about incidents of foul language he used. (Tr. 384-85). Wood testified that management just blew off his profanity and swearing. (Tr. 385). Coleman told union representative Bob Amundsen that Wood's testimony could be self-incriminating. (Tr. 385-86). The union representatives met and, then, requested that Wood's testimony be stricken from the record. Coleman accepted that request. (Tr. 386). Coleman, however, denies that Amundsen asked for immunity for Wood. (Tr. 401). After the hearing, Coleman concluded that Complainant should remain discharged. (CX 74; Tr. 383).

VI. CONCLUSIONS OF LAW

The employee protection provisions of AIR 21 are set forth at 49 U.S.C. § 42121 (passed April 5, 2000). Subsection (a) proscribes discrimination against airline employees as follows:

> No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to

> compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--
>
> > (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;
> >
> > (2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;
> >
> > (3) testified or is about to testify in such a proceeding; or
> >
> > (4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C. § 42121(a).

The decisional law developed under the whistleblower protection provisions of the Energy Reorganization Act of 1974 ("ERA"), as amended in 1992, the Whistleblower Protection Act ("WPA") and environmental statutes provide the framework for litigation arising under AIR 21. *See* Procedures for the Handling of Discrimination Complaints under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century; Final Rule, 67 Fed. Reg. 15,453-15,461 (April 1, 2002)(to be codified at 29 C.F.R. Part 1979). The statutory scheme established by AIR 21 essentially mirrors the protective provisions of the prevailing nuclear and environmental statutes. The exception is that AIR 21 provides extraordinary powers to OSHA to order immediate reinstatement of airline employees upon a showing of reasonable cause. Accordingly, the jurisprudence developed under existing whistleblower statutes will be applied to the instant case.

The ERA whistleblower statute contains the same burden of proof standards which are included in the AIR 21 statute. The employee protection provision of the ERA, 42 U.S.C. §§ 5851, was amended by Congress in 1992 "to include a burden-shifting framework distinct from the Title VII employment-discrimination burden-shifting framework first established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-805 (1973)." *See Trimmer v. United States Department of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999). Under the ERA and AIR 21, during the investigative process, a complainant is required to establish a prima facie case that

raises a reasonable inference that his protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint. 42 U.S.C. §42121(b)(2)(B)(i). However, even if the employee establishes a prima facie case, the Secretary cannot investigate the complaint if the employer can prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the employee's behavior. §42121(b)(2)(B)(ii). Thus, only if the employee establishes a prima facie case and the employer fails to disprove the allegation of discrimination by clear and convincing evidence may the Secretary even investigate the complaint.

Once a case has been tried fully on the merits, it no longer serves any analytical purpose to address and resolve the question of whether the complainant presented a prima facie case. Instead, the relevant inquiry is whether the complainant prevailed by a preponderance of the evidence on the ultimate question of liability. *See Carroll v. Bechtel Power Corp.*, 1991-ERA- 46 slip op. at 9-11 (Sec'y Feb. 15, 1995), *aff'd Carroll v. U.S. Dept. of Labor*, 78 F.3d 352 (8th Cir. 1996); 42 U.S.C. §42121(b)(2)(B)(iii); *see also Paynes v. Gulf States Utilities Co.*, ARB No. 98-045, ALJ No. 1993-ERA-47 (ARB Aug. 31, 1999); *Trimmer*, 174 F.3d at 1101-1102; *Dysert v. Secretary of Labor*, 105 F.3d 607, 609-610 (11th Cir. 1997) (holding that the complainant's burden is a preponderance of the evidence). Thus, it must be determined whether Complainant has proven, by a preponderance of the evidence, that he engaged in protected activity under the Act, that United took adverse action against Complainant, and that Complainant's protected activity was a contributing factor in the adverse action that was taken. *See* 42 U.S.C. §5851 (b)(3)(C); *Simon v. Simmons Foods*, 49 F.3d 386 (8th Cir. 1995); *Ross v. Florida Power and Light*, Case No. 96-ERA-36, ARB Case No. 98-044, Fin. Dec. & Ord., Mar. 31, 1999, slip op. at 6.

In *Marano v. Department of Justice*, 2 F.3d 1137 (Fed. Cir. 1993), interpreting the Whistleblower Protection Act, 5 U.S.C. §§ 1221(e)(1), the Court observed:

> The words "a contributing factor" . . . mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant," "motivating,""substantial," or "predominant" factor in a personnel action in order to overturn that action.

Marano, 2 F.3d at 1140 (citations omitted).

Only if complainant meets his burden by a preponderance of the evidence does the burden shift to the employer to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the employee's behavior. *Trimmer*, 174 F.3d at 1102. Although there is no precise definition of "clear and convincing," the Secretary and the courts recognize that this evidentiary standard is a higher burden than preponderance of the evidence but less than beyond a reasonable doubt. *See Yule v. Burns Int'l Security Service*, Case No. 1993-ERA-12 (Sec'y May 24, 1995).

If a respondent meets its burden to produce a legitimate, nondiscriminatory reason for its employment decision, the complainant must then assume the burden of proving by a preponderance of the evidence that the respondent's proffered reasons are "incredible and constitute pretext for discrimination." *Overall v. Tennessee Valley Authority*, Case No. 1997-ERA-53 at 13 (ARB Apr. 30, 2001).

Initially, I note that my jurisdiction is limited by law in this case to deciding only whether the complainant was discriminated against because he engaged in protected activity under the applicable protection statutes. I am limited to deciding only this issue and cannot consider whether the employer acted properly in making decisions unrelated to the complainant's protected activity. Likewise, I do not have the authority to decide whether the complainant's supervisors acted improperly unless those actions were related to the protected activity under the applicable statutes. My inquiry must focus solely on whether the complainant's protected activity was the reason for the adverse actions taken by Respondent.

A. *Protected Activity*

I am guided by secretarial decisions on what action constitutes a protected activity under similar whistle blowing statutes. Under environmental protection statutes, the Secretary has broadly defined a protected activity as a report of an act which the complainant reasonably believes is a violation of the environmental acts. While it does not matter whether the allegation is ultimately substantiated, the complaint must be "grounded in conditions constituting reasonably perceived violations of the environmental acts." *Minard v. Nerco Delamar Co.*, 92-SWD-1 (Sec'y Jan. 25, 1995), slip op. at 8. In other words, the standard involves an objective assessment. The subjective belief of the complaint is not sufficient. *Kesterson v. Y-12 Nuclear Weapons Plant*, 95-CAA-12 (ARB Apr. 8, 1997). In the *Minard* case, the Secretary indicated the complainant must have reasonable belief that the substance is hazardous and regulated under an environmental law. Consequently, the complainant's concern must at least "touch on" the environment. *Nathaniel v Westinghouse Hanford Co.*, 91- SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9; and, *Dodd v. Polysar Latex*, 88-SWD-4 (Sec'y Sept. 22, 1994). If a complainant had a reasonable belief that the respondent was in violation of an environmental act, that he or she may have other motives for engaging in protected activity is irrelevant. The Secretary concluded that if a complainant is engaged in protected activity which "also furthers an employee[']s own selfish agenda, so be it." *Carter v. Electrical District No. 2 of Pinal County*, 92-TSC-11 (Sec'y July 26, 1995) (some evidence indicated that Complainant's motives were to retaliate because of a wage dispute with a new manager).

The Secretary of Labor has consistently held that an employee who makes internal safety complaints is protected under the whistleblower provisions of the applicable environmental statutes. *Goldstein v. Ebasco Constructors Inc.*, Case No. 86-ERA-36 (Sec'y Dec. and Order April 7, 1992), *rev'd sub. nom,. Ebasco Contractors, Inc. v. Martin*, No. 92-4576 (5th Cir. Feb. 16, 1993)(per curiam); *Willy v. The Coastal Corporation*, Case No. 85-CAA-1 (Sec'y Dec. and Order June 4, 1987);*Mackowiak v. University Nuclear Systems, Inc.* , Case No. 82-ERA-8

(Sec'y Dec. and Order April 29, 1983). Reporting safety and environmental concerns under CERCLA internally to one's employer is protected activity. *Dodd v. Polysar Latex*, 88-SWD-4 (Sec'y Sept. 22, 1994); *see also Helmstetter v. Pacific Gas & Electric Co.*, 91-TSC-1 (Sec'y Jan. 13, 1993)(addressing internal complaints under TSC complaint); *Hermanson v. Morrison Knudsen Corp.*, 94-CER-2 (ARB June 28, 1996)(addressing internal complaints under CERCLA). According to the Secretary, an internal complaint should be a protected activity because the employee has taken his or her concern first to the employer to permit a chance for the violation to be corrected without government intervention. *Poulos v. Ambassador Fuel Oil Co., Inc.*, 86-CAA-1 (Sec'y Apr. 27, 1987)(order of remand). The report may be made to a supervisor, through an internal complaint or quality control system, or to an environmental staff member. *Williams v TIW Fabrication & Machining, Inc.*, 88-SWD-3 (Sec'y June 24, 1992); *Bassett v. Niagara Mohawk Power Corp.*, 85-ERA-34 (Sec'y Sept. 28, 1993); and, *Helmstetter v. Pacific Gas & Electric Co.*, 91-TSC-1 (Sec'y Jan. 13, 1993).

To constitute protected activity, an employee's acts must implicate safety definitively and specifically. *American Nuclear Resources v. U.S. Department of Labor*, 134 F.3d 1292 (6th Cir. 1998). The whistleblower statutes do not protect every incidental or superficial suggestion that somehow, in some way, may possibly implicate a safety concern. *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1574 (11th Cir. 1997). Raising particular, repeated concerns about safety issues that rise to the level of a complaint constitutes protected activity. *Bechtel Construction Co. v. Secy. of Labor*, 50 F.3d 926, 931 (11th Cir. 1995). Making general inquiries regarding safety issues, however, does not automatically qualify as protected activity. *Id*. Where the Complainant's complaint to management "touched on" subjects regulated by the pertinent statutes, the complaint constitutes protected activity. *See Nathaniel v. Westinghouse Hanford Co.*, 91-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9.

Complainant alleges that he engaged in protected activity in each of his communications regarding the July 6, 2000 safety incident, up through February 2001. (Complainant's Closing Brief, p. 7). Each incident involving Complainant's claims to management will be reviewed individually.

1. Complainant's report to Robert Hendricks of a safety problem on July 6, 2000

Immediately after Complainant and Pommerer completed the necessary repairs on the aircraft, they spoke with Hendricks about the dangerous situation Pommerer faced when the plane's bleed was turned on without their knowledge. The conversation centered around the safety of the mechanics and was directed toward their immediate supervisor. Clearly, the conversation was protected activity. *See, e.g., Bassett v. Niagara Mohawk Power Corp.*, Case No. 1985-ERA-34 (Sec'y Sept. 28, 1993).

2. Complainant's discussion with Steve Sanborn on July 6, 2000

After Complainant spoke with Hendricks, Sanborn was summoned to the hangar, and Complainant and Pommerer discussed the safety incident with Sanborn. Like Complainant's conversation with Hendricks, this report of the safety concern was protected activity. *Id.*

3. Complainant's co-submission of safety gram on July 11, 2000

Complainant's formal submission of an internal safety concern to United management is quintessential protected activity, and Respondent appropriately stipulates so. (Respondent's Closing Brief, p. 11). *See Dodd v. Polysar Latex*, 88-SWD-4 (Sec'y Sept. 22, 1994)(reporting safety and environmental concerns internally to one's employer is protected activity).

4. Complainant's inquiry in September 2000 of Steve Sanborn whether safety gram had been resolved

Complainant heard that the safety issue had been resolved from Robert Hendricks, who testified that Mr. Weakland had proclaimed the safety issue closed. To that point, Complainant had yet to receive an answer to his safety concern.

Complainant's inquiry into the response to his safety complaint is protected activity. Where the Complainant's complaint to management "touches on" subjects regulated by the pertinent statutes, the complaint constitutes protected activity. *See Nathaniel v. Westinghouse Hanford Co.*, 91-SWD-2 (Sec'y Feb. 1, 1995). Thus, although Complainant's inquiry of Sanborn did not reiterate his safety concern, his question touched on his concern about the proper involvement of foremen, such as Huber, in situations like that faced on July 6, 2000.

5. Complainant's telephone call to United's Chicago offices to inquire whether the safety complaint had been resolved

Complainant's telephone call was protected activity. At this point, Complainant was under the impression that resolution of his safety complaint had been achieved; however, he was unaware of such a resolution. His attempt to clarify the status of his safety complaint is protected activity. *Id.*

6. Complainant's calls in September and October 2000 to James Rynott for advice

Complainant's inquiries to Rynott about his safety concern are protected activity. In *Hermanson v. Morrison Knudsen Corp.*, 94-CER-2 (ARB June 28, 1996), the Board observed that an informal and internal safety complaint may constitute protected activity. *Id*. at 5 (citing *Nichols v. Bechtel Construction, Inc.*, 87-ERA-44, slip op. at 10 (Sec'y Oct. 26, 1992)(holding employee's verbal questioning of foreman about safety procedures constituted protected activity),

and *Dysert v. Westinghouse Electric Corp.*, 86-ERA-39, slip op. at 1, 3 (Sec'y Oct. 30, 1991) (holding employee's complaints to team leader protected)).

7. Complainant's attempts to locate the flight crew

Complainant called United's Chicago, New York, and San Francisco offices in an attempt to contact the flight crew. The record is devoid of evidence that Complainant communicated his safety concerns when he attempted to contact the flight crew. To constitute protected activity, an employee's acts must implicate safety definitively and specifically. *American Nuclear Resources*, 134 F.3d at 1292. While Complainant's motivation may have been resolution of the dispute over what the flight crew was told, his attempts to learn the identity of the flight crew does not implicate safety definitely and specifically. Accordingly, it is not protected activity.

8. Complainant's provision of copies of the safety gram to United's Chicago and San Francisco offices in early October 2000

Complainant's further reporting of his safety concern is clearly protected activity. Before his submission to the corporate offices, Complainant had received misinformation regarding the status of the safety complaint and Sanborn's post-dated response. Clearly, Complainant had not received an adequate response to his concerns, and his attempt to receive clarification from corporate offices was reasonable. In *Carson v. Tyler Pipe Co.*, 93-WPC-11 (Sec'y Mar. 24, 1995), the Secretary held that it is not permissible to find fault with an employee for failing to observe established channels when making safety complaints. Therefore, an allegation that the complainant was reprimanded for circumventing the chain of command when he sent a letter to upper management complaining of record falsifications was evidence of protected activity. *Id.* Accordingly, Lawson's communication with Respondent's corporate offices was also protected activity.

9. Complainant's October 9, 2000 meeting with Weakland and Stuke

The purpose of the meeting was to discuss Complainant's concerns with safety and the subsequent investigation. Again, a complainant's meeting with management to discuss his safety concerns is quintessential protected activity. In *Passaic Valley Sewerage Commissioners v. United States Dept. of Labor*, 992 F.2d 474 (3rd Cir. 1993), the court held that the employee protection provision of the Clean Water Act, 33 U.S.C. § 1367(a), extends to wholly intracorporate complaints and that the pursuit of internal remedies and voluntary remediation, rather than automatic start of formal investigations and litigation, is to be encouraged.

10. Complainant's October 24, 2000 e-mail to upper-management

Complainant's e-mail (CX 15) addressed both his safety concern and his frustration with the investigation of the incident on July 6, 2000. Complainant addressed both as "blatant disregard[s] for our safety." *Id.* The e-mail was protected activity. Protected activity has been

found when an employee takes the opportunity to publicize his concerns in a broad forum. *See Immanuel v. Wyoming Concrete Industries, Inc.*, 95-WPC-3 (ALJ Oct. 24, 1995).

11. Complainant's meeting with Stuke and Krasovec

Like Complainant's meeting with Weakland and Stuke, his meeting with Krasovec and Stuke was protected activity as the sole purpose of the meeting was to discuss Complainant's safety concerns and United's response. *See Passaic Valley Sewerage Commissioners v. United States Dept. of Labor*, 992 F.2d 474, 478-79 (3rd Cir. 1993)("it is most appropriate, both in terms of efficiency and economics, as well as congenial with inherent corporate structure, that employees notify management of their observations as to the corporation's failures before formal investigations and litigation are initiated, so as to facilitate prompt voluntary remediation and compliance").

12. Complainant's meeting with Goetz and Thompson

For the reasons stated above, Complainant's meeting with Goetz and Thompson was protected activity. *Id.*

13. Complainant's participation in the January 2001 "closure" meeting

Likewise, Complainant's participation in the "closure" meeting was protected activity as the purpose was to discuss and resolve Complainant's safety complaints. *Id.*

14. Complainant's follow-up meeting with Thompson

Complainant's meeting with Thompson was to discuss unresolved issues with the "closure" meeting. Thompson even told Complainant he voiced valid complaints about the "closure" meeting. As the meeting was centered around Complainant's safety complaints, it is protected activity. *Id.*

15. Complainant's e-mail to Tony Boots in February 2001

Complainant's e-mail to Mr. Boots is not part of the instant record. Respondent, however, has not argued that the e-mail did not exist. Rather, Respondent argues that Pommerer authored the e-mail, and, thus, it was not Complainant who engaged in protected activity. I find such argument unpersuasive. Complainant and Pommerer both testified to Complainant's aid in the preparation of the e-mail, and, as I have found both witnesses credible, I find that Complainant participated in the preparation of the e-mail. As the e-mail involved Complainant's safety concerns and United's response, I find it was protected activity. *See Nathaniel v. Westinghouse Hanford Co.*, 91-SWD-2 (Sec'y Feb. 1, 1995).

B. *Adverse Employment Action*

To constitute an adverse action, Complainant must demonstrate by a preponderance of the evidence that the action had some adverse impact on his employment. *See Trimmer*, 174 F.3d at 1103 (citing *Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 359 (8th Cir. 1997)); *but see DeFord v. Secretary of Labor*, 700 F.2d 281, 287 (6th Cir. 1983))(economic loss is not required for action to be adverse). The governing regulations define discrimination or an adverse employment action very broadly. *See* 29 C.F.R. 24.2(b)("Any employer is deemed to have violated the particular federal law and the regulations in this part if such employer intimidates, threatens, restrains, coerces, blacklists, discharges, *or in any other manner discriminates against any employee* because the employee has [engaged in protected activity]"). Activities found to be adverse employment actions include, but are not limited to, elimination of position, threats of termination, blacklisting, causing embarrassment and humiliation, constructive discharge, and issuance of disciplinary letters.

Complainant alleges that the respondent discriminated against him because of his protected activity by walking him off of the job on April 2, 2001, and terminating him on May 9, 2001. (Complainant's Closing Brief, p. 8). Respondent stipulates that Complainant's termination was an adverse employment action. (Respondent's Closing Brief, p. 11). As Complainant's termination was an adverse employment action as a matter of law, I find Complainant suffered an adverse employment action. 29 C.F.R. §1979.102(a).

Respondent's "walk off" of Complainant on April 2, 2001 was also an adverse employment action. The equivalent of a suspension, Respondent's actions have been deemed adverse employment actions by the Secretary. *See Floyd v. Arizona Public Service Co.*, 90-ERA-39 (Sec'y Sept. 23, 1994)(holding adverse actions included suspensions from work). Accordingly, I find Respondent's "walk off" of Complainant on April 2, 2001 was also an adverse employment action.

C. *Protected Activity as a Contributing Factor in Adverse Employment Action*

Like most cases of discrimination or retaliation, the instant case lacks a "smoking gun." *See Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 48 (3d Cir. 1989). The complainant need not have any specific knowledge that the respondent's officials had an intent to discriminate against the complainant, however; ERA employee protection cases may be based on circumstantial evidence of discriminatory intent. *See Frady v. Tennessee Valley Authority*, 92-ERA-19 and 34, slip op. at 10 n. 7 (Sec'y Oct. 23, 1995); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984)(quoting *Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980)).

In *Timmons v. Mattingly Testing Services*, 95- ERA-40 (ARB June 21, 1996), the Board reviewed principles governing the evaluation of evidence of retaliatory intent in ERA whistleblower cases. The Board indicated that where a complainant's allegations of retaliatory intent are

founded on circumstantial evidence, the fact finder must carefully evaluate all evidence pertaining to the mindset of the employer and its agents regarding the protected activity and the adverse action taken. The Board noted that there will seldom be "eyewitness" testimony concerning an employer's mental process. Fair adjudication of whistleblower complaints requires "full presentation of a broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to the adverse action taken." *Id.* at 5. The Board continued:

> Antagonism toward activity that is protected under the ERA may manifest itself in many ways, e.g., ridicule, openly hostile actions or threatening statements....
>
> When disciplinary action, including termination from employment, is involved, the past practice of the employer in similar situations is relevant to determining whether there has been disparate treatment, which may provide highly probative evidence of retaliatory intent.
>
> Furthermore, a complete understanding of the testimony of the witnesses, including testimony regarding technical procedures, is necessary for the drawing of pertinent inferences and the resolution of conflicts in that testimony.

Id. at 5-7 (citations omitted).

The Complainant has proven, by a preponderance of the evidence, that he engaged in protected activity under the Act and that United took adverse action against him. As Complainant has established the first two factual predicates, at question here is Complainant's proof of the final factual predicate of his case: Complainant's protected activity was a contributing factor in the adverse action that he suffered. *See* 49 U.S.C. §42121(b)(2)(B)(iii); 42 U.S.C. §5851(b)(3)(C).[6]

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[6] The parties' closing briefs expend considerable energy analyzing whether a reasonable inference of discrimination has been demonstrated. The proof of a reasonable inference of discrimination is only required for a prima facie case. In the instant opinion, however, I have bypassed the analytical framework of a prima facie case because, at this point in the proceedings, the ultimate question of liability is relevant, not Complainant's success or failure in proving a prima facie case. *See, e.g., Trimmer,* 174 F.3d at 1101-02 and n. 4-5. Although the parties' arguments are styled to address a prima facie case, I have considered their arguments in the context of the ultimate question of liability and under the burden of "preponderance of the evidence." This approach does no harm to Respondent, for, if Respondent claims that Complainant's arguments fail to demonstrate a reasonable inference of discrimination, it is implicit that they concomitantly fail to demonstrate discrimination by a preponderance of the evidence. Likewise, the analytical paradigm does not harm Complainant, for it is Complainant's burden to produce arguments at some point in his or her case, which prove discrimination by a preponderance of the evidence.

Complainant argues that Complainant's protected activity contributed to Respondent's adverse employment decision in at least four ways: 1) Complainant's protected activity and the adverse employment action are temporally proximate; 2) Respondent deviated from established disciplinary procedures when disciplining Complainant; 3) Complainant received disparate discipline for foul language use and insubordination; and 4) Sanborn's allegation of intimidation lacks merit.[7] (Complainant's Closing Brief, pp. 9-15).

Respondent argues that discrimination is not demonstrated by temporal proximity due to the intervening event of Complainant's confrontations with Sanborn. (Respondent's Closing Brief, p. 11-12). Respondent also argues, albeit within its pretext discussion, that Complainant did not receive disparate punishment, but rather he committed a different offense warranting a more severe response. (Respondent's Closing Brief, pp. 23-35).

The Secretary has noted that one factor to consider is the temporal proximity of the subsequent adverse action to the time the respondent learned of the protected activity, when addressing Complainant's proof of a prima facie case. *Jackson v. Ketchikan Pulp Co.*, 93-WPC-7 and 8 (Sec'y Mar. 4, 1996); *Conway v. Valvoline Instant Oil Change*, Inc., 91-SWD-4 (Sec'y Jan. 5, 1993). As I noted above, the question of a prima facie case at this point in the proceedings is irrelevant. I address the question of temporal proximity, however, as the timing between the protected activity and adverse employment action can be circumstantial evidence of discrimination, regardless of whether the issue is satisfaction of a prima facie case or otherwise.

Findings of causation based on closeness in time have ranged from two days, (*Lederhaus v. Donald Paschen & Midwest Inspection Service, Ltd.*, 91-ERA-13 (Sec'y Oct. 26, 1992), slip op. at 7), to about one year (*Thomas v. Arizona Public Service Co.*, 89-ERA-19 (Sec'y Sept. 17, 1993)). On the other hand, just as temporal proximity may be a factor in showing an inference of causation, the lack of it also is a consideration, especially if a legitimate intervening basis for the adverse action exists. *Evans v. Washington Public Power Supply System*, 95-ERA-52 (ARB Jul. 30, 1996) (citing *Williams v. Southern Coaches, Inc.*, 94-STA-44 (Sec'y Sept. 11, 1995)). If a significant period of time elapses between the time the respondent is aware of the protected activity and the adverse action, the absence of a causal connection between the protected activity and the adverse action may be sufficiently established. *Shusterman v. Ebasco Serv., Inc.*, 87-ERA-27 (Sec'y Jan. 6, 1992), slip op. at 8-9. In *Tracanna v. Arctic Slope Inspection Service*, ARB No. 98-168, ALJ No. 1997-WPC-1 (ARB July 31, 2001), the ARB held that temporal proximity did not always provide a reasonable inference of discrimination:

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[7] Complainant also addresses whether Complainant and Mr. Pommerer are similarly situated employees. As this argument is responsive to Respondent's arguments, I do not discuss it here. (Complainant's Closing Brief, p. 15-16). In addition, I decline to address Complainant's argument that Respondent engaged in a policy of intimidating whistle-blowing mechanics as Complainant's argument appears to center on factual predicates I have previously ruled not a part of this case – primarily, Respondent's withdrawal of a settlement offer. (Complainant's Closing Brief, p. 16-17).

> Temporal proximity may be sufficient to raise an inference of causation in an environmental whistleblower case. *See, e.g., Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). When two events are closely related in time it is often logical to infer that the first event (e.g. protected activity) caused the last (e.g. adverse action). However, under certain circumstances even adverse action following close on the heels of protected activity may not give rise to an inference of causation. Thus, for example, where the protected activity and the adverse action are separated by an intervening event that independently could have caused the adverse action, the inference of causation is compromised. Because the intervening event reasonably could have caused the adverse action, there no longer is a logical reason to infer a causal relationship between the activity and the adverse action. Of course, other evidence may establish the link between the two despite the intervening event. As the court held in *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279 (3d Cir. 2000), "we have ruled differently on this issue [raising an inference of retaliatory motive based on temporal proximity] . . . depending, of course, on how proximate the events actually were, and the context in which the issue came before us." (Emphasis added.)

Slip op. at 7-8 (footnote omitted).

I find the instant case is one contemplated by *Tracanna*. While Complainant's suspension and termination follow closely on the heels of his eight month span of protected activity, Complainant's confrontations with Sanborn from February to April sever the causal link between his protected activity and the adverse employment actions. Because the intervening event reasonably could have caused the adverse action, there no longer is a logical reason to infer a causal relationship between the activity and the adverse action *based on temporal proximity alone*.

I find, however, that other circumstantial evidence establishes that Complainant's protected activity was a contributing factor to the adverse employment actions he suffered.[8]

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[8] To demonstrate that Complainant's protected activity was a contributing factor in his suspension and termination, substantial portions of Complainant's argument focus on the lack of merit in Respondent's charges of foul language use, intimidation, and insubordination. I find Complainant's arguments very persuasive; however, in an attempt to avoid repetitious analysis, I have delayed discussion of those arguments to my analysis of Respondent's proof of legitimate, nondiscriminatory reasons for the adverse employment action. Regardless of my decision to forestall discussion of such arguments to the next section, Complainant's attack on the merit of the employer's rationale is persuasive evidence of retaliation, and it helps Complainant establish that his protected activity was a contributing factor in the adverse employment action he suffered. In addition, notwithstanding Complainant's attacks on the merit of Respondent's proffered rationales, Complainant has produced sufficient circumstantial evidence to demonstrate, by a preponderance of the evidence, that Complainant's protected activity was a contributing factor in the adverse employment action he suffered.

First, the evidence is clear that Complainant received no warnings regarding his use of offensive, abrasive language. Indeed, by all accounts, Complainant was an excellent employee, receiving several commendations for his superior work and attendance. Respondent argues that United maintained no formal policy of counseling, (Respondent's Rebuttal Brief, p. 3-5), but ample testimony during the formal hearing demonstrated that counseling was the accepted practice when dealing with disciplinary measures. Sanborn described counseling as "the first step" in addressing "a person with that behavior." (Tr. 1139). Sanborn testified to counseling Mr. Hendricks and Mr. Aldretti, (Tr. 1092, 1138-41), but not Complainant. (Tr. 1130). Galloway testified about counseling "numerous" employees such as Tim Ross for use of foul language toward supervisors, but he stated that he did not counsel Complainant for fear of making the situation more volatile. (Tr. 801, 886). Huber testified that he may have asked Wally Dahl if counseling was appropriate for Complainant after he had a confrontation with Complainant in February 2001. (Tr. 547). Respondent even highlighted the range of punishments, as dictated by the context of the incident, utilized by United. (Tr. 184-85).

Respondent's argument that management did not warn Complainant for fear of appearing retaliatory is singularly unpersuasive. Rather, Respondent's "decision" to delay any disciplinary action until effectively suspending Complainant, via a "walk off," smacks of retaliation. It defies common sense that withholding a warning or counseling from an employee benefits the employee in any fashion, yet this is the rationale advanced repeatedly by Huber, Sanborn, and Galloway. (Tr. 546-47, 812-14, 886, 1131, 1160). Given the readily-accepted, foul language atmosphere testified to by several witnesses and apparently tolerated by United management, the decision by management to withhold counseling Complainant about his behavior appears to be a form of sandbagging. I find such tactics, standing alone, are probative evidence of retaliatory discrimination.

Second, there are several examples evidencing that Complainant was viewed as a nuisance for raising his safety concerns and demanding an adequate investigation. The evidence also indicates that United management cavalierly approached the problem, when it addressed it at all.

> – Krasovec, in an e-mail to John Weakland, stated, "John - I believe we have talked about this incident before. *It appears that Mr. Lawson doesn't feel he has been talked to enough*. (CX 9)(emphasis added).

> – Krasovec, in a response to Stuke's e-mail, stated, "Nancy - this is an issue on our Midnight shift...*We have answered this on numerous occasions apparently Mr. Lawson doesn't get it*." (CX 10, p. 1)(emphasis added).

> – After meeting personally with Complainant and Pommerer, Stuke promised a response to their concerns, but no response ever materialized. (Tr. 76, 469).

– Krasovec authored another e-mail in which he exasperatingly recounts the efforts to answer the concern. (CX 16).

– Sanborn's pre-dated response to the safety gram attempts to blame Complainant and Pommerer for "closing the door to any communication or improvement." (CX 5). But, the record demonstrates that it was Sanborn who stifled communication, not the mechanics, by failing to meet with Pommerer and Complainant and failing to engage in a sufficient investigation of the problem.

– Complainant and Pommerer never received a response after their communication with Tony Boots.

– In the January "closure" meeting, when Complainant asked about Sanborn's pre-dating of his response letter to the safety gram, Thompson stated, "Funny nobody got his letter and everybody but God got yours." (Tr. 483).

– The "closure" meeting report made specific proposals to address the safety issues raised by Complainant and Pommerer, yet it appears that the recommendations were never acted upon.

– Finally, and most glaringly, Sanborn and Huber were not present during the January "closure" meeting.

Galloway testified that Sanborn and Huber were not invited to the meeting in order to avoid tension and hostility. (Tr. 889). This is completely unbelievable. The record is clear that the safety problem originated with a dispute over Huber's actions, and the primary management employee in charge of resolving the problem was Sanborn. Why would the two main actors in the problem not be invited to participate and achieve "closure?" Furthermore, beyond the obvious frustration with Huber's actions shared by Pommerer and Complainant, the record is devoid of other evidence of tension and hostility between the parties in January 2001. The confrontations between Sanborn and Complainant did not begin until the following month. Galloway's explanation evidences a sloppy, cavalier approach to addressing Complainant's concerns, rather than a genuine attempt at closure.

Third, Galloway linked Complainant's suspension and subsequent termination to his protected activity. (Tr. 908).

> Q: If the safetygram had never been filed or if Mr. Sanborn had been truthful during the course of the investigation, would you agree with me that Mr. Lawson would have never been fired when he was?
>
> A: That was one of the links.

> Q: It was one of – it was an essential link, wasn't it?
>
> A: Not the filing of the safetygram. *It was I guess Dave's inability to accept closure from the corporation*.

Id. (emphasis added). Galloway's admission is telling. Of course, the "closure" Respondent attempted to provide was based on the misrepresentations of Sanborn.

The most probative circumstantial evidence that Complainant's protected activity was a contributing factor in the adverse employment action he suffered is Complainant's evidence concerning Steve Sanborn. After considering all of the testimony and documentary evidence in the instant case, I do not hesitate to conclude that, but for the actions of Sanborn, this case would never have come before this Court. Sanborn is undoubtedly the central player in the instant controversy. His poor investigation of Complainant's safety complaint and, more importantly, his numerous misrepresentations to all parties involved sewed the seeds of frustration and distrust leading to a drawn out investigation of a basically routine safety matter and Complainant's eventual termination. There is no debate that Complainant's behavior towards Sanborn from February to April 2001 was occasionally boorish, but the primary force behind the controversy is undoubtedly Sanborn.

Sanborn played an integral role at every stage – from his initial meeting with Complainant and Pommerer on July 6, 2000 in which he instructed them *not* to file a safety gram until his key participation in the meetings and investigation leading to Complainant's suspension and termination. The record reveals a litany of actions and statements of Sanborn that are circumstantial evidence that Complainant's termination was retaliatory, such as:

> – From the beginning, Sanborn kept his distance from Complainant because he viewed Complainant as "anti-management."
>
> – Sanborn directed Complainant and Pommerer not to file a safety gram, but they did anyway, effectively going over Sanborn's head.
>
> – Sanborn conducted a superficial investigation, failing to interview the flight crew. United admits the investigation was poor.
>
> – Despite being under orders to meet with Complainant and Pommerer from Weakland, Sanborn did not meet with them and misrepresented meeting with them to his supervisors..
>
> – Sanborn back-dated his response to the safety gram, claiming it was lost in a mail loophole.

– In his response, Sanborn blamed the mechanics for not wanting a meeting, but he never offered one to begin with.

– Sanborn also blamed Weakland for misunderstanding that he had met with Complainant and Pommerer.

– Sanborn again was untruthful about having several meetings with the mechanics to discuss the safety gram when he told Krasovec that each time they spoke, the discussion returned to the issue of the presence of foremen on the runway. (CX 16).

– Sanborn apparently lied to Complainant about not knowing anything of Hendricks' remark that the safety issue had been resolved. This is true because, at the "closure" meeting, Weakland told Complainant that he (Weakland) had told Hendricks the issue was over based on statements made by Sanborn. (Tr. 482).

– Sanborn's version of the actual number of confrontations with Complainant varied.

– Sanborn's version of the proximity of himself to Complainant during the April 2, 2001 confrontation near the break room varied.

– Sanborn's version of the decision-making process involved in Complainant's discipline varied. At first, Sanborn testified that Galloway, Zunker, and he approached Complainant in the break room with the intent of talking through a change in Complainant's behavior. Later, Sanborn contradictorily testified that he and Galloway approached Complainant with the intent of imposing Level 4 discipline.

When I consider the preponderance of the evidence, I find Complainant has established that his protected activity was a contributing factor to the adverse employment actions he suffered. The evidence demonstrates that Respondent 1) failed to seriously respond to Complainant's concerns, when it responded at all; and 2) became frustrated with Complainant's persistence. While Respondent viewed Complainant's actions as those of an employee unable to accept closure of a problem, the evidence reveals that Respondent's perception of Complainant was formed by the misrepresentations of Sanborn, who, on numerous occasions, represented to his supervisors that the investigation was proceeding properly and fully. The record reveals nothing was further from the truth. Furthermore, Sanborn's substantial influence throughout the series of events leading to Complainant's suspension and termination is also probative circumstantial evidence of retaliatory discrimination. Sanborn lacks credibility, as his testimony was contradicted on numerous points, and, as Respondent's case hinges largely on the credibility of Sanborn and his version of events between Complainant and himself, Respondent's allegations are inherently suspect. In addition, as will be discussed in the following paragraphs, Complainant's

demonstration of the lack of merit in Respondent's proffered rationales for his termination is further evidence of retaliatory discrimination. Accordingly, I find Complainant has established, by a preponderance of the evidence, that his protected activity was a contributing factor in the adverse employment action he suffered.

D. *Respondent's Burden To Articulate Legitimate, Non-Discriminatory Rationale*

If the complainant demonstrates that his protected activity contributed to Respondent's adverse employment action, the respondent then has a burden to produce evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. 49 U.S.C. § 42121 (b)(2)(B)(iv). Relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior. 29 C.F.R. §1979.109(a).

Respondent argues that Complainant's suspension and termination were predicated upon three non-discriminatory factors of Complainant's behavior: 1) foul language use, 2) intimidation, and 3) insubordination. It is Respondent's burden to demonstrate the preceding rationales by clear and convincing evidence.[9]

1. Complainant's foul language usage

The evidence demonstrates Complainant used foul language on several occasions. There is no dispute that Complainant called Steve Sanborn a "piece of shit," nor is there any dispute that Complainant used unkind language toward Sanborn on several occasions, calling him "Mr. Integrity" and asserting he had no conscience. Complainant readily admits to using such language. He testified that his frustration manifested itself in an "unappealing manner" and that he was not proud of his comments to Sanborn. (Tr. 924).

The punishment suffered by Complainant for his foul language was disparate, however. The record is replete with evidence that foul language offered in an abusive, aggressive tone was commonly used by mechanics and supervisors during the course of the normal workday.[10] Indeed,

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[9] In its closing brief, Respondent misstates the applicable law. (Respondent's Closing Brief, p. 12-13 and passim). First, *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220 (10th Cir. 2000), arises under 42 U.S.C. §1981, which utilizes a different burden-shifting proof scheme than the Air Act. Thus, Respondent's citation of *Kendrick* to support its de minimus burden is error. Secondly, Respondent's citation of *Eliam v. Children's Hosp. Ass'n.*, 173 F.3f 863 (10th Cir. 1999), is inappropriate as that case citation is merely an affirmance with no substantive opinion from the Tenth Circuit Court of Appeals. Similarly, Respondent's contention that its mere production of legitimate, non-discriminatory reasons for Complainant's termination is sufficient is error. (Respondent's Closing Brief, p. 22).

[10] *See infra* note 11.

Galloway testified that 60-80% of mechanics used foul language. (Tr. 802). During the hearing, witnesses Hendricks, Brown, Wood, Margos, Griego, Ross, and Kulachkosky testified about foul language in the workplace. Complainant's language is tame compared to the many examples noted above. Hendricks and Wood testified to *numerous* incidents where they used extremely aggressive, foul language towards their supervisors. Neither were disciplined. Furthermore, Ross testified to threats of violence, but he also avoided punishment. I also found Mr. Kulachkosky's testimony persuasive. Kulachkosky testified to a heated confrontation wherein his supervisor, Jim Nirri, used extremely harsh language. Kulachkosky was so upset at the incident that he reported the incident to the operating manager, Doug Harwood, and to United's Human Relations Department. (Tr. 276). Despite the reports, Mr. Nirri was never disciplined. Indeed, there appears to have been an effort to talk the problem through, or "counsel." (Tr. 277-78).

While I hesitate to describe Complainant's language as "garden-variety" barbarism, the words chosen by Complainant were neither as severe as the many other incidents testified to at the hearing nor as violent. Supporting the determination that Complainant's punishment for alleged foul language was disparate is the fact that Complainant was an excellent employee. Complainant received numerous commendations for his work and attendance, and his record is devoid of any previous behavior problems. Thus, when I consider the lack of punishment for seemingly similar behavior, I find that Respondent has failed to prove by clear and convincing evidence that Complainant's suspension and subsequent termination was based upon Complainant's foul language.

2. Complainant's intimidation of Steve Sanborn

The evidence demonstrating Complainant's intimidation of Sanborn is comprised of several verbal exchanges between Complainant and Sanborn witnessed by no other United employees. Complainant asserts that he intended no intimidation and no intimidation occurred. Sanborn advances that he felt intimidated over the span of several confrontations. The first occurred in February when Complainant called him a "piece of shit." The second occurred when Complainant called Sanborn "Mr. Integrity" as he entered the break room. The third occurred when Complainant walked into a room to eat his lunch, observed Sanborn seated alone, and said, "Now I can eat my lunch and puke." The final intimidating confrontation occurred on April 2, 2001, when Complainant again called Sanborn a "piece of shit," asked him how he slept at night, and accused him of having no conscience.

For the following reasons, I find that Respondent has failed to demonstrate its intimidation rationale by clear and convincing evidence.

First, the incidents alone are not objectively intimidating. There is absolutely no evidence that any physical movement or posture was taken by Complainant to send a message of intimidation. Sanborn admits as much. Rather, Sanborn testified that Complainant's words and facial expressions alone intimidated him, when combined with the fact that Complainant allegedly sought out opportunities to confront Sanborn when they were alone. The words do indicate a

strong dislike between the two men, but there exists a wide gulf between dislike and intimidation. Furthermore, the aggressive words are not unlike numerous other incidents described in testimony at the hearing by United mechanics and supervisors. In addition, there exists no evidence that Complainant sought out confrontations when no witnesses were present. Two of the three confrontations occurred in or around the mechanics' break room, which is most certainly a high traffic area. The "lunch" confrontation between Sanborn and Complainant apparently occurred when Complainant was looking for a place to eat, rather than on a nefarious mission to intimidate Sanborn. Finally, Complainant's interactions with Sanborn are understandable to a certain degree. While this Court cannot and does not condone abusive or foul language in the workplace, the evidence shows a repeated pattern of misrepresentations at best, lies at worst, on the part of Sanborn. From conversations with his supervisor to conversations with Pommerer and Complainant, Sanborn routinely misrepresented issues surrounding the safety gram and its investigation. Complainant's remarks concerning Sanborn's integrity and conscience are less aggressive when placed in the context in which they were delivered. Complainant knew that Sanborn was the management individual chiefly in charge of the safety investigation, and he also knew that the investigation was badly mishandled. In the second paragraph of Respondent's closing brief it admits as much when it states that "United's local management dropped the ball." (Respondent's Closing Brief, p. 2). In this context, Complainant was clearly upset about Sanborn's role in the investigation, but the record contains no evidence of intimidation.

Beyond the paucity of objective evidence demonstrating intimidation, only Sanborn's subjective assertions of intimidation remain. I find his assertions of little weight, however, as Sanborn's credibility is minimal at best. The record reveals a pattern of misrepresentations on Sanborn's part, and the surrounding circumstances give this Court no pause to credit Sanborn's version of events more than any other part of his testimony. Sanborn's manager testified that Sanborn appeared "scared" in his office, but I accord that little weight when I consider there exists little difference in the physical expression of an intimidated individual and an individual coming to the realization that a subordinate employee has caught him in a series of misrepresentations and poor performance on the job. Given Sanborn's credibility, I find it more plausible that Sanborn was not worried about Complainant as much as he was worried about the stability of his own employment.

Third, Respondent's proof addressing when and how the intimidation charge originated is suspect on numerous grounds, such as

> – Sanborn's version of the actual number of intimidating confrontations was not consistent. Sanborn testified to a confrontation with Complainant in February and that he spoke with someone about it, yet he could not recall to whom he spoke. He also failed to mention the incident in his charging papers or summaries during the investigative review hearing.
>
> – Sanborn's version of how close Complainant moved to him in the break room in April 2001 changed from "in passing" to "in my face." (CX 72-73).

– Kevin Zunker does not even recall intimidation being mentioned when he first met with Sanborn and Galloway. (Tr. 1008-09). This meeting was *after* all the allegedly intimidating confrontations had occurred.

– Furthermore, if Complainant's intimidation had been as severe as Respondent alleges, the statements of Galloway and Sanborn that they originally only desired to talk through the problem with Complainant make little sense. (Tr. 1101-02). Either it was a minor issue or not.

The Respondent's equivocation on Complainant's intimidation of Sanborn gives the appearance that the intimidation charge is not genuine.

Fourth, I give little credence to Sanborn's subjective impressions of his confrontations with Complainant as Sanborn was threatened by Complainant from the beginning. (Tr. 1063, 1065, 1128). Sanborn viewed Complainant as embittered toward management from his initial meeting with Complainant, and he admitted he kept his distance from the mechanic up until Complainant was terminated.

Fifth, Zunker's notes of the investigation, (CX 30), reveal that intimidation was not a basis for discipline at that time. Zunker's notes reflect that Sanborn twice stated that Complainant was being held out of service for insubordination, but they do not reflect that Sanborn included intimidation in the charge. (CX 30, p. 1-2). According to Zunker's notes, Galloway inquired about the confrontations with Sanborn, but nowhere does Zunker record that Galloway or Sanborn informed Complainant that he was being held out of service for intimidation. The notes do reflect that Sanborn referenced Rule 36 as a reason for Complainant's discipline; however, Rule 36 specifically addresses foul language directed toward a supervisor and is classified as a special form of intimidation. (JX 7, p. 63). Whether Rule 36 is interpreted as addressing foul language or insubordination, it does not address intimidation.[11] Zunker's notes corroborate his testimony that intimidation was not discussed when Galloway, Sanborn, and Zunker first met to discuss the situation. (Tr. 982).

For the foregoing reasons, I find Respondent has failed to establish, by clear and convincing evidence, a legitimate, nondiscriminatory basis for terminating the complainant on the grounds of intimidation.

[11] Interestingly, United's comments in regard to Rule 36 provide, "Had supervision been ignoring or putting up with the employee's disrespectful behavior? *If so, some counselling* [sic] *would be in order to advise the employee that his behavior has gone too far and, in the future, he will be held accountable for it*. (JX 7, p. 63)(emphasis added). At no time was Complainant counseled.

3. Complainant's insubordination

The record does not establish a legitimate, nondiscriminatory basis for terminating the Complainant on the basis of insubordination by clear and convincing evidence for the following reasons.

First, the delay between the "order" for an investigation and Complainant's compliance was brief at three to five minutes. Testimony from each individual involved supported this time frame. The brief time span, when considered with the conversations that occurred between the parties involved, is more indicative of disagreement over the conditions of the investigation or confusion over the purpose of the investigation rather than a party's refusal to participate.

Second, no evidence exists that Complainant explicitly refused a direct order. No party testified that Complainant ever explicitly refused a direct order.

Finally, Respondent's insubordination rationale erodes completely when Respondent's guidelines on insubordination are considered. (JX 7, p. 60-63). Respondent's Rule of Conduct 22 addresses "classic insubordination" and applies when an employee refuses to comply with a direct order of a supervisor. (JX 7, p. 61). The applicable level of discipline is Level 4 to discharge. United's guidelines state, "[Insubordination] is characterized by the employee who willfully defies authority even though he understands the consequences of doing so." *Id.* United provides the following guidance to its supervisors on handling cases of potential insubordination:

> – At the first sign that an employee is refusing to follow your order, direct him to go to your office or some other private area. Avoid a confrontation in front of other employees or passengers.
>
> – Be certain the employee understands that you are giving him a direct order. Use the word "order" and be definite about what you expect him to do and when you expect him to do it.
>
> – Ask the individual if he understands the order. Be specific and repeat it if necessary.
>
> – Advise the employee that he must obey the order now; that he has the right to grieve later if he disagrees.
>
> – Discuss any concerns the employee may have about obeying the order (e.g. safety). If you consider those concerns unreasonable, explain why they do not justify the employee's refusal to do the work.
>
> – If it's apparent that the employee is not going to comply, ask him if he is refusing your direct order. If so, ask him if he realizes that he is being insubordinate and

that his refusal will be considered a violation of Rule 2, exposing him to at least a Level 4, and possibly discharge.

– Give the person time to reconsider and comply.

(JX 7, p. 61-62). As a final recommendation, United's guidelines state, "Do not let your mood or the press of time let you treat a mere protest, a question, or a passing display of disrespect as insubordinate behavior. (JX 7, p. 62).

I find that Respondent failed on each and every point listed above, with the exception of instructing Complainant to go to a private area. Neither Galloway nor Sanborn would tell Complainant the nature of the investigation. (Tr. 664). Kevin Thomas testified that Complainant asked what the nature of the investigation was two to four times before either Galloway or Sanborn stated that it was for intimidating a foreman. (Tr. 224-25). Neither Sanborn nor Galloway told Complainant that it was a direct order, although both testified that Sanborn said he was giving Complainant a "directive." Neither asked Complainant if he understood the order, nor was Complainant told he had the right to grieve the instruction later. Neither Galloway nor Sanborn tried to discuss Complainant's concerns with him. No party ever informed Complainant that his "refusal" to go with the men was insubordination, and, even if Complainant's hesitation was interpreted as a refusal, he was never given an opportunity to reconsider his refusal.

Sanborn's reason for not following the guidelines is equally unimpressive. Sanborn stated, "I think these [situations] weren't clear-cut enough to find in any guidelines...I didn't use the exact words, no." (Tr. 1149, 1151).

Respondent advances that Galloway's and Sanborn's lack of adherence to Respondent's guidelines is not persuasive evidence that the insubordination charge lacks merit because the guidelines are not mandatory. (Respondent's Closing Brief, p. 35-36). Respondent is correct that deviation from non-binding employer guidelines alone is not probative evidence that the employer's charge lacks merit. However, when the objective evidence fails to demonstrate any scenario closely resembling insubordination, Respondent's complete failure to comply with its guidelines for dealing with insubordination gains probative strength. The totality of the evidence addressing the April 2, 2001 break room confrontation between Sanborn, Galloway, Zunker, and Complainant establishes that there was a disagreement over the nature and location of the investigation spanning a brief period of time. Despite evidence of a disagreement, no evidence exists that Complainant explicitly refused to comply and, indeed, Complainant's compliance with the investigation was soon to follow.

Respondent has failed to establish, by clear and convincing evidence, the existence of legitimate, nondiscriminatory grounds for Complainant's suspension and termination. I have analyzed the grounds for termination advanced by Respondent individually, and, when I consider the evidence propounded by Respondent as a whole, I continue to find that Respondent fails to meet its heavy burden.

VII. CONCLUSION

The record demonstrates that Complainant's protected activity was a contributing factor to the adverse employment action he suffered. Furthermore, Respondent has not proven a legitimate, nondiscriminatory reason for Complainant's suspension or subsequent discharge.

VIII. RELIEF

29 C.F.R. §1979.109(b) states:

> If the administrative law judge concludes that the party charged has violated the law, the order shall direct the party charged to take appropriate affirmative action to abate the violation, including, where appropriate, reinstatement of the complainant to that person's former position, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and compensatory damages. At the request of the complainant, the administrative law judge shall assess against the named person all costs and expenses (including attorneys' and expert witness fees) reasonably incurred.

Complainant seeks the following relief: 1) an Order requiring United to purge his personnel file of all references to his protected acts and the subject discipline; 2) an Order prohibiting Respondent from further retaliation against him and other mechanics contrary to the Act; 3) back pay for the time missed from work, totaling approximately $100,000 and covering the period from April 2, 2001, until August 8, 2002; 4) reimbursement of employee benefits lost, including medical co-pays and health insurance premium payments totaling $2,438.96 and replacement of the 12,000 shares of stock Complainant sold; 5) interest of 9% per annum, on any award; 6) general compensatory damages for mental pain and suffering; and 7) attorney's fees and costs.

A. Back pay

The statute and implementing regulations of the Act clearly provide for the award of back pay. 49 U.S.C. §42121(b)(3)(B)(ii); 29 C.F.R. §1979.109(b). The purpose of a back pay award is to make the employee whole, that is, to restore the employee to the same position he would have been in if not discriminated against. Back pay awards should, therefore, be based on the earnings the employee would have received but for the discrimination. *See Blackburn v. Metric Constructors, Inc.*, 86-ERA-4 (Sec'y Oct. 30, 1991). A complainant has the burden of establishing the amount of back pay that a respondent owes. *See Pillow v. Bechtel Construction, Inc.*, 87-ERA-35 (Sec'y July 19, 1993). Because back pay promotes the remedial statutory purpose of making whole the victims of discrimination, "unrealistic exactitude is not required" in calculating back pay. *EEOC v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 587 (2d Cir. 1976)(quoting *Hairston v. McLean Trucking Co.*, 520 F.2d 226, 233 (4th Cir. 1975)). Uncertainties in establishing the amount of back pay to be awarded are to be resolved against the discriminating party, however. *McCafferty v. Centerior Energy*, 96-ERA-6 (ARB Sept. 24,

1997). Interim earnings at a replacement job are deducted from back pay awards. *Williams v. TIW Fabrication & Machining, Inc.*, 88-SWD-3 (Sec'y June 24, 1992).

Evidence that the complainant failed to mitigate damages will reduce the amount of the back pay owed. The respondent has the burden of establishing that the back pay award should be reduced because the complainant did not exercise diligence in seeking and obtaining other employment. *West v. Systems Applications International*, 94-CAA-15 (Sec'y Apr. 19, 1995). To meet this burden, the respondent must show that (1) there were substantially equivalent positions available; and (2) the complainant failed to use reasonable diligence in seeking these positions. The benefit of a doubt ordinarily goes to the complainant. Interim earnings or an amount which could be earned with reasonable diligence are reductions to a back pay award. A complainant may be "expected to check want ads, register with employment agencies, and discuss potential opportunities with friends and acquaintances." *Doyle v. Hydro Nuclear Services*, 89-ERA-22 (ARB Sept. 6, 1996).

Complainant alleges that he is entitled to back pay totaling $100,000. (Complainant's Closing Brief, p. 22).

Respondent advances that Complainant is not entitled to back pay because he failed to mitigate his damages by refusing Respondent's offer of reinstatement, citing *Giandonato v. Sybron Corp.*, 804 F.2d 120, 124 (10th Cir. 1986). (Respondent's Rebuttal Brief, p. 18). Respondent conveniently omits the Tenth Circuit's substantial discussion addressing the criteria of the offer, however. *Id.* at 123-25. Refusal of an *unconditional* offer of reinstatement to a substantially equivalent position constitutes a breach of the obligation to mitigate damages. *See id.*; *Williams v. TIW Fabrication & Machining, Inc.*, 88-SWD-3 (Sec'y June 24, 1992). In *Giandonato*, the court stated that refusal of an offer of reinstatement does not automatically terminate an employee's right to back pay. The court provided, "In determining whether the right to relief extends beyond the date of an offer of reinstatement, the trial court must consider the circumstances under which the offer was made or rejected, including the terms of the offer and the reasons for refusal." *Giandonato*, 804 F.2d at 124 (quoting *Clairborne v. Illinois Central Railroad*, 583 F.2d 143, 153 (5th Cir. 1978)).

Respondent's offer of reinstatement was premised on Complainant's acceptance of a Level 4 discipline and no back pay. Respondent's offer was conditional. As Complainant explained, Respondent's offer of reinstatement placed him one minor infraction away from termination. (Tr. 962). Furthermore, Complainant's acceptance of a Level 4 discipline for his actions – which he believed were acceptable – would have compromised his ability to deny wrongdoing in a subsequent discrimination case. The Supreme Court has held that a claimant "forfeits his right to back pay if he refuses a job substantially equivalent to the one he was denied." *Ford Motor Company v. EEOC*, 1982, 458 U.S. 219, 232 (1983). The Court noted, however, that a claimant's obligation to mitigate damages does not require him or her to accept an offer that conditions employment on the claimant's agreement to compromise his or her discrimination claims. *Id.* at 458 U.S. 232 n. 18. Respondent's offer, which would have forced Complainant to

admit to intimidation or insubordination, would have compromised his discrimination claim. Accordingly, Respondent's conditional offer of reinstatement does not preclude Complainant's right to back pay.

Respondent further argues that Complainant failed to mitigate his damages by failing to look for alternative employment for four months. (Respondent's Closing Brief, p. 20). The record, however, supports no such allegation. Complainant testified that he worked minor construction jobs after his termination while he continued to search for permanent jobs in construction, plumbing, and electric. (Tr. 521). Complainant was then laid off from a construction job in September, and, then, he resumed his attempts to work in the airline industry. *Id.* In January, Complainant enrolled in college, and he also worked part-time at Home Depot earning $13.00 per hour. It is Respondent's burden to demonstrate a lack of diligence on the part of Complainant in finding employment, and Respondent's bald assertion that Complainant did not try hard enough is insufficient.

Accordingly, Complainant is entitled to back pay from his date of termination on May 9, 2001, until his court-ordered reinstatement on August 9, 2002, as limited by interim earnings. (Complainant's Closing Brief, p. 1).

Scott Brown, aviation mechanic and chairperson of the International Association of Machinists and Aerospace Workers, testified at the formal hearing. Brown testified that the recently signed contract between the union and Respondent provided for a retroactive pay increase to July 2000. (Tr. 713). Brown testified that the pay increase amounted to $10.00 per hour. The calculation of back pay should include any salary increases that reasonably would have occurred in the period between the complainant's discharge and his or her reinstatement. *See Mosbaugh v. Georgia Power Co.*, 91-ERA-1 and 11 (Sec'y Nov. 20, 1995). Currently, Brown estimated that United mechanics made $35.00 per hour. (Tr. 714).

Complainant's back pay award includes the $10.00 per hour pay increase from July 2000 until May 9, 2001, and the full amount of wages he would have earned from May 10, 2001, until August 9, 2002.

Complainant has not received the retroactive pay increase for approximately 45 weeks of work from July 2000 until May 9, 2001. Assuming 40 hours of work per week, Complainant is owed $18,000.00 in back pay for the retroactive pay increase.

Complainant has not received his wages for May 9, 2001, until his reinstatement on August 9, 2002. The period is 15 months, or 67 weeks, long. Using $35.00 per hour as Complainant's base salary, and again assuming forty hours of employment per week, Complainant is owed $93,800.00 in additional back pay. Accordingly, Complainant is owed a total back pay award of $111,800.00.

Complainant's back pay award is limited by any interim earning Complainant received, however. The record reveals that Complainant earned $3,419.00 in the construction industry from April 2001 until December 2001. (Tr. 526). In addition, he earned $220.00 from a short-lived job. *Id.* From May 2002 until the hearing in June 2002, Complainant worked at Home Depot an average of 23 hours per week, earning $13.00 per hour. I assume and credit Complainant with continued employment at Home Depot until the date of his reinstatement at United, and, thus, I credit Complainant with three months, or thirteen weeks, of employment at Home Depot. Given his rate of pay and hours per week, Complainant would have earned $3,887.00. Accordingly, I credit Complainant with total interim earnings of $7,526.00.

Complainant's entitlement to back pay, minus interim earnings, totals $104,274.00.

B. Interest

A back pay award is designed to make whole the employee who has suffered economic loss as a result of an employer's illegal discrimination. The assessment of prejudgment interest is necessary to achieve this end. Prejudgment interest on back wages recovered in litigation before the Department of Labor is calculated, in accordance with 29 C.F.R. § 20.58(a), at the rate specified in the Internal Revenue Code, 26 U.S.C. § 6621. The employer is not to be relieved of interest on a back pay award because of the time elapsed during adjudication of the complaint. *See Palmer v. Western Truck Manpower, Inc.*, 85-STA-16 (Sec'y Jan. 26, 1990) (where employer has the use of money during the period of litigation, employer is not unfairly prejudiced); *Blackburn v. Metric Constructors, Inc.*, 86-ERA-4 (Sec'y Oct. 30, 1991).

C. Reimbursement of lost employment benefits

Complainant seeks the replacement of lost employee benefits, including medical co-pays and health insurance premium payments totaling $2,438.96 and replacement of the 12,000 shares of stock Complainant sold. (Complainant's Closing Brief, p. 22).

In *Creekmore v. ABB Power Systems Energy Services, Inc.*, 93-ERA-24 (Dep. Sec'y Feb. 14, 1996), the Deputy Secretary indicated that health, pension and other related benefits are terms, conditions and privileges of employment to which a successful ERA complainant is entitled from the date of a discriminatory layoff until reinstatement or declination. Such compensable damages include medical expenses incurred because of termination of medical benefits, including premiums for family medical coverage.

In *Crow v. Noble Roman's, Inc.*, 95-CAA-8 (Sec'y Feb. 26, 1996), the administrative law judge recommended that the Respondent pay, as compensatory damages, any reasonable medical costs that would have been covered under the Respondent's health insurance coverage. The Secretary observed that the Respondent is required to pay those medical costs as part of its obligation to reinstate the Complainant to his former position, together with its conditions and privileges, such as health insurance coverage. The Secretary noted that should the Complainant

decline reinstatement, the Respondent would be required to reimburse the Complainant for medical costs as part of the back pay award.

1. Complainant's medical co-pays and health insurance premium payments

Complainant has produced testimony that Complainant's termination resulted in increased health care costs for the Lawson family, with increased medical co-pays and health insurance premiums totaling $2,438.96. Respondent does not challenge the validity of these numbers, but, rather, asserts that Complainant failed to mitigate damages. I have determined that Complainant mitigated his damages sufficiently, and, thus, I decline to adopt Respondent's argument.

Courts disagree about the proper method of calculating the value of lost insurance coverage. *See, e.g., Aledo-Garcia v. Puerto Rico Nat'l Guard Fund, Inc.*, 887 F.2d 354, 356 (1st Cir. 1989)(holding that cost to employer is reasonable method for calculation of value of health insurance benefits as amount of wages that could have been earned includes value of any fringe benefits, such as medical insurance, that are generally provided by employer); *Kossman v. Calumet County*, 800 F.2d 697, 703-04 (7th Cir. 1986)(holding employer must reimburse the cost of alternate insurance actually purchased); *Weiss v. Parker Hannifan Corp.*, 747 F.Supp. 1118, 1132 (D. N.J. 1990)(awarding actual unreimbursed medical expenses). I find the Secretary's *Crow* decision adopts the *Weiss* method: awarding out-of-pocket expenditures actually incurred that would have been covered by the employer's insurance.

I note that the record is not clear on how much of the claimed $2,438.96 represent co-pays. Complainant was required to pay co-pays under his United plan and his wife's new plan, albeit his co-pays rose when he no longer had access to United's plan. (Tr. 330). It is quite possible that some of the $2,438.96 represent co-pays that United would not have paid notwithstanding Complainant's termination. This disparity, however, figures to be a de minimus amount. As Respondent has not attempted to challenge the figure, and as uncertainties in establishing the amount of back pay to be awarded are to be resolved against the discriminating party, I award Complainant the full amount alleged.

2. Complainant's sale of 12,000 shares of stock

The instant record is unclear on the nature of the stock sold by the complainant. The testimony of Ms. Jodie Lawson intimates that the sale was from Complainant's pension. (Tr. 328). Furthermore, the record fails to provide details on the par value per share of the stock at the time of receipt or sale. As the value of the stock sale may or may not affect the amount of back pay Complainant is entitled to, both parties are ORDERED to provide the court with a supplemental discussion of the facts and law concerning the effect of Complainant's sale of stock on his entitlement to back pay already computed by the Court. The parties' discussion of this issue should be included in Complainant's petition for attorney's fees and Respondent's response, respectively.

D. Compensatory Damages

The Act clearly contemplates the possible award of compensatory damages. 29 C.F.R. §1979.109(b). Compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment, and humiliation. Such awards may be supported by the circumstances of the case and testimony about physical or mental consequences of retaliatory action. The testimony of medical or psychiatric experts is not necessary, but it can strengthen a Complainant's case for entitlement to compensatory damages. *See Thomas v. Arizona Public Service Co.*, 89- ERA-19 (Sec'y Sept. 17, 1993).

Complainant argues that a "significant sum" of compensatory damages is appropriate for the instant case. (Complainant's Closing Brief, p. 22). Respondent advances that the record does not reflect conditions warranting a compensatory damages award. (Respondent's Rebuttal Brief, p. 21-23).

Complainant was upset about losing his job, stating, "[You] put your life into your career and that career is over....what are you going to do now?" (Tr. 520). As the sole income earner in his family, Complainant testified that the termination was "devastating" to his family. (Tr. 531). Complainant's wife described their lives after the termination as "a roller coaster ride of emotion." (Tr. 327). She testified concerning the difficulties of finding work for herself and her husband and the ensuing financial difficulties. (Tr. 328). Ms. Lawson stated that the family had incurred approximately $5,500.00 in credit card debt, dipped into retirement savings, received loans from their respective parents, and borrowed money from friends. (Tr. 328-29). The family contemplated moving to California, going as far as to put their home on the market. (Tr. 329-30). Ms. Lawson also testified to the hardship of inferior health benefits, describing an incident where she refused her husband's request to go to the emergency room for her illness because of a large co-pay. (Tr. 330). Both Lawsons' children are asthmatic, and required burdensome medical treatment. (Tr. 331). Ms. Lawson also testified to stomach problems suffered by her husband that were stress-related. *Id.* Ms. Lawson herself was treated for depression after a visit to a psychologist. (Tr. 332). While Ms. Lawson testified that the stress at home has eased, she stated that it was still very hard. (Tr. 339-40). Complainant attended stress and anger management counseling after his termination. (Tr. 518-19).

In *Leveille v. New York Air National Guard*, ARB No. 98-079, ALJ Nos. 1994-TSC-3 and 4 (ARB Oct. 25, 1999), the ARB reaffirmed the longstanding principal that compensatory damage awards should be similar to awards made in other cases involving comparable degrees of injury. The following are cases exploring a complainant's right to compensatory damages.

– *Lederhaus v. Donald Paschen & Midwest Inspection Service, Ltd.*, 91-ERA-13 (Sec'y Oct. 26, 1992). The Secretary reviewed the complainant's evidence concerning emotional distress resulting from his retaliatory discharge, and compared the circumstances to those of other emotional distress awards, and found that the complainant was entitled to $10,000 in compensatory damages. Corroborated testimony showed, inter alia, that: 1) the complainant was without

a job for five and one half months; 2) during that time he and his wife were constantly harassed by bill collectors, and had to borrow money; 3) the complainant became depressed and angry, and contemplated suicide; 4) the complainant's family life suffered; he argued with his wife over money, and he cut off contact with relatives because of embarrassment over the lack of money.

– *McCuistion v. Tennessee Valley Authority*, 89-ERA-6 (Sec'y Nov. 13, 1991), slip op. at 21-22 ($10,000 award; complainant harassed, blacklisted and fired; forfeited life, health and dental insurance; unable to find other employment; exacerbated preexisting hypertension and caused stomach problems; sleeping difficulty, exhaustion, depression and anxiety).

– *DeFord v. Tennessee Valley Authority*, 81- ERA-1 (Sec'y Apr. 30, 1984), slip op. at 2-4 ($10,000 award; medical expenses related to termination; stress, anxiety and depression for which he was still being treated at the time of the Secretary's order).

– *Van der Meer v. Western Kentucky University*, ARB Case No. 97-078, ALJ Case No. 95-ERA-38, ARB Dec., Apr. 20, 1998. The ARB awarded Van der Meer $40,000 because he suffered public humiliation and the respondent made a statement to a local newspaper questioning Van der Meer's mental competence.

– *Gaballa v. The Atlantic Group*, Case No. 94-ERA-9 (Sec'y Jan 18, 1996). Gaballa had been blacklisted, and testified that he felt his career had been destroyed by the respondent's action. The Secretary reviewed the compensatory damages awards for mental and emotional suffering made in a number of cases, which ranged from $10,000 to $50,000, and awarded Gaballa $35,000.

– *Smith v. Littenberg*, Case No. 92-ERA-52 (Sec'y, Sept. 6, 1995). The Secretary affirmed the ALJ's recommendation of award of $10,000 for mental and emotional stress caused by discriminatory discharge where Smith supported his claim with evidence from a psychiatrist that he was "depressed, obsessing, ruminating and ha[d] post-traumatic problems."

– *Blackburn v. Metric Constructors, Inc.*, Case No.1986-ERA-4 (Sec'y Aug. 16, 1993). The Secretary awarded Blackburn $5,000 for mental pain and suffering caused by discriminatory discharge where Blackburn became moody and depressed and became short tempered with his wife and children.

I find the record clear that Complainant's termination from Respondent created a hardship for the Lawson family. Complainant suffered physical problems due to stress and weathered the tension of seeking income for his family. He was confronted with the stress of his wife and children's illnesses complicated by the lack of money. He has been forced to borrow money from friends and family members. Thus, taking into account the prior awards in comparable cases, I order Respondent to pay Complainant compensatory damages in the amount of $15,000.00.

ORDER

IT IS HEREBY ORDERED that Respondent, United Airlines, Inc.,:

1. Purge Complainant's personnel file of all references to his engaging in protected activity and the discipline emanating therefrom, as discussed in the opinion above, and such references shall not be used against Complainant in the event he applies for any future employment opportunities with Respondent, or in providing a reference concerning Complainant to any other potential employers.;

2. Reinstate Complainant;

3. Pay to Complainant back pay and other relief in accordance with the discussion above;

4. Pay to Complainant interest on back pay from the date the payments were due as wages until the actual date of payment. The rate of interest is payable at the rate established by section 6621 of the Internal Revenue Code, 26 U.S.C. § 6621;

5. Pay to Complainant compensatory damages in the amount of $15,000.00 for the infliction of the emotional distress;

6. Pay to Complainant all costs and expenses, including attorney fees, reasonably incurred by them in connection with this proceeding. Thirty days is hereby allowed to complainants' counsel for submission of an application of attorney fees. A service sheet showing that service has been made upon the respondent must accompany the application. Respondent has ten days following receipt of such application within which to file any objections.

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JOSEPH E. KANE
Administrative Law Judge

NOTICE: Review of the Decision and Order issued in the above captioned matter is by the Administrative Review Board pursuant to §§ 4.c.(39) of the Secretary's Order 2-96, 61 Fed. Reg.19978(1996) and 29 C.F.R. § 1979.110. That Order provides that the Administrative Review Board is delegated authority and assigned responsibility to act for the Secretary of Labor in issuing final agency decisions on questions of law and fact arising in review or on appeal of certain enumerated decisions and recommended decisions by Administrative Law Judges. This delegation includes any laws subsequently enacted, such as AIR 21, which by statute provide for final decisions by the Secretary of Labor upon review of decisions or recommended decisions

issued by Administrative Law Judges. See 49 U.S.C.A. §§ 42121(b)(3)(A). Absent an appeal, this Decision and Order and the administrative file in this matter will not be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, D.C. 20210. See 5 U.S.C. §§ 557(b).